IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Michelin North America, Inc.,	)	C.A. No. 6:17-1599-HMH
	)	
Plaintiff,	)	**OPINION & ORDER**
	)	
vs.	)	
	)	
Federal Insurance Company,	)	
	)	
Defendant.	)	

This matter is before the court on Federal Insurance Company's ("Federal") motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,[1] and Michelin North America, Inc.'s ("MNA") motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure[2] and motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated herein, the court denies Federal's motion and grants MNA's motion for summary judgment.

[1] Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, the court treats Federal's motion to dismiss as a motion for summary judgment, because Federal presented materials outside of the pleadings.

[2] Rule 12(c) of the Federal Rules of Civil Procedure provides that a motion for judgment on the pleadings is appropriate "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). The pleadings have not closed, because Federal has not filed an answer to the complaint. Thus, a motion for judgment on the pleadings is premature. However, a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure can be filed "at any time until 30 days after the close of all discovery" unless ordered otherwise. Fed. R. Civ. P. 56(b). Therefore, the court will consider MNA's motion for summary judgment only.

I. STATEMENT OF THE FACTS

This case arises out of an insurance coverage dispute between MNA and its insurer, Federal. MNA established and maintained the Michelin Retirement Plan (the "Michelin Plan"), an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), for the benefit of its employees. (Compl. ¶ 5, ECF No. 1.) In accordance with the bonding requirements of ERISA, MNA procured a Pension and Welfare Fund Fiduciary Dishonesty Policy (the "Federal Policy") with a policy coverage limit of $5,000,000.00 from Federal. (Id. Ex. A (Federal Policy 2), ECF No. 1-1.) Around January 2016, MNA discovered that the Michelin Plan had suffered a loss in excess of $8,000,000.00, due to the fraudulent activities of fiduciaries of the Michelin Plan. (Id. at ¶ 12, ECF No. 1.) Federal concedes that the Federal Policy covers the loss suffered by the Michelin Plan. (Id. Ex. B (Federal Letter 2), ECF No. 1-2.) Federal paid MNA $2,540,042.00 of its coverage. (Id. at ¶ 24, ECF No. 1.)

On June 19, 2017, MNA filed this instant action alleging claims for declaratory judgment and breach of contract, seeking a declaration that Federal has breached the insurance contract and is obligated to pay the full policy limits, and that Federal is required to pay MNA an additional $2,459,958.00. Federal filed a motion to dismiss on August 18, 2017. (Def.'s Mot. Dismiss, ECF No. 13.) MNA filed a response in opposition to the motion dismiss, and filed a motion for judgment on the pleadings and a motion for summary judgment on September 18, 2017. (Pl.'s Resp. Opp'n Mot. Dismiss, ECF No. 17.) (Pl.'s Mot. Summ. J., ECF No. 16.) Federal filed a reply in support of its motion to dismiss, and a response in opposition to MNA's motions for summary judgment and judgment on the pleadings on October 13, 2017. (Def.'s Reply Supp. Mot.

Dismiss, ECF No. 22.) (Def.'s Resp. Opp'n Summ. J., ECF No. 22.) MNA filed a reply in support of its motion for judgment on the pleadings and motion for summary judgment on October 27, 2017. (Pl.'s Reply Supp. Mot. Summ. J., ECF No. 25.) Federal filed a sur-reply on November 1, 2017. (Def.'s Sur-Reply Opp'n Mot. Summ. J., ECF No. 30.) This matter is now ripe for consideration.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "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). In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

A litigant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Monahan v. Cty. of Chesterfield, Va., 95 F.3d 1263, 1265 (4th Cir. 1996) (internal quotation marks and citation omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that

there be no *genuine* issue of *material* fact." Ballenger v. N.C. Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (internal quotation marks and citation omitted).

B. Cross Motions for Summary Judgment

Federal moves for summary judgment and requests that the court find that it has fully paid MNA the proportionate share that Federal owes under the Federal Policy. (Def.'s Mot. Dismiss 1, ECF No. 13.) MNA moves for summary judgment on its declaratory judgment and breach of contract claims, seeking a request that the court declare that Federal must pay the remaining $2,459,958.00 in accordance with the policy limits of the Federal Policy. (Pl.'s Mem. Supp. Mot. Summ. J. 24, ECF No. 16-1.) MNA alleges that Federal breached the Federal Policy by not paying the full policy limits thereunder. (Compl. ¶¶ 20-25, ECF No. 1.)

Under South Carolina law, "[t]o establish its breach of contract claim, [MNA] must show: (1) the existence of a contract, (2) its breach, and (3) the damages caused by such breach." Episcopal Church in South Carolina v. Church Ins. Co. of Vermont, 993 F. Supp. 2d 581, 593 (D.S.C. 2014) (citing Branche Builders, Inc. v. Coggins, 686 S.E.2d 200, 202 (S.C. Ct. App. 2009)). Federal concedes that the Federal Policy covers the loss suffered by the Michelin Plan and that the loss amount exceeds the policy limits. (Compl. Ex. C (Federal Letter 3), ECF No. 1-3.) However, Federal alleges that it is not required to pay any additional sums than what it has already paid. (Id., ECF No. 1-3.) Federal alleges that the Federal Policy includes an "other insurance" clause that limits Federal's coverage amount because there is another insurance policy that covers the loss. (Def.'s Mem. Supp. Mot. Dismiss 2-3, ECF No. 13-1.) Specifically, Federal argues that its coverage amount is limited by an American International

Group ("AIG") insurance policy ("AIG Policy") issued to Compagnie General Des Etablissements Michelin ("CGEM"), a related entity to MNA. (Compl. ¶ 15, ECF No. 1.)

Federal has attached the AIG Policy, which is written in French, and an English translation of the AIG Policy to its motion to dismiss. (Def.'s Mem. Supp. Mot. Dismiss Ex. 1 (AIG Policy), ECF No. 13-2.) The AIG Policy is governed by French law and provides that "[a]ll disputes relating to the interpretation, the performance or the termination of this contract come under the sole competence of the French courts." (Id. Ex. 1 (AIG Policy 51), ECF No. 13-2.) Federal contends that the AIG Policy is a concurrent policy, which covers the loss MNA has incurred as a result of the fraud. (Id. at 1-3, ECF No. 13-1.) Further, Federal argues that because the AIG Policy also contains an "other insurance" clause, the loss suffered by MNA must be prorated between the two policies. (Id., ECF No. 13-1.)

Under South Carolina law, concurrent insurance exists if separate policies insure: "(1) the same entity; (2) against the same risk; (3) to the same object; (4) absent some express intent to the contrary ('total policy insuring intent')." Sec. Ins. Co. of Hartford v. NationsBank, N.A., Nos. 00-1482, 00-1501, 2001 WL 256038, at *1 (4th Cir. Mar. 15, 2001) (unpublished) (citing South Carolina Ins. Co. v. Fidelity and Guaranty Ins. Underwriters, Inc., 489 S.E.2d 200, 203 (S.C. 1997)). Generally, when two insurance policies provide concurrent coverage and contain competing "other insurance" clauses, the loss is prorated according to their respective policy limits. Id. at 204-06. "[T]his rule should not apply 'when its use would distort the meaning of the terms of the policies involved.' The total policy insuring intent of the parties always should remain the central issue in apportioning liabilities among multiple insurers." Id. (internal citations omitted).

However, "[o]ther insurance clauses govern the relationship *between insurers*; they do not affect the right of the insured to recover under each concurrent policy." Yaffe Companies v. Great Am. Ins. Co., 499 F.3d 1182, 1189 (10th Cir. 2007) (emphasis added) (citing Lee R. Russ, Couch on Insurance § 219:1 (3d ed. 2007)); see e.g., Sec. Ins. Co. v. Arcade Textiles, Inc., C.A. No. 0:98 2545-17 (D.S.C. Mar. 16, 2000) (unpublished) ("'Other insurance' clauses only affect the insured's right to recovery under each concurrent policy. Inter-insurer loss allocation by way of 'other insurance' clauses never permits allocation of a loss to the insured. Payment of the insured's claim always takes priority over the allocation of the loss between concurrent insurers.") (quoting Douglas R. Richmond, Issues and Problems in "Other Insurance," Multiple Insurance, and Self Insurance, 22 Pepp. L. Rev. 1373, 1380-81 (1995)); In re Oil Spill by the Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2014 WL 5524268, at *8 (E.D. La. Oct. 31, 2014) (unpublished) aff'd in part, rev'd in part on other grounds, 807 F.3d 689 (5th Cir. 2015) (citing Couch on Insurance, supra, § 219:1); Liberty Mut. Ins. Co. v. Pella Corp., 633 F. Supp. 2d 714, 724 (S.D. Iowa 2009) ("[U]nder well-established law, 'other insurance' provisions found in policies providing primary coverage govern the relationship *between insurers*, and do not diminish an insured's coverage rights under any concurrent insurance policies."). "'Other insurance' clauses are intended to apportion an insured loss between or among insurers." South Carolina Ins. Co., 489 S.E.2d at 202.[3]

[3] With regard to other insurance clauses, other states have also found that apportionment among insurers has no affect on the insurers' obligations to the insured. See RLI Ins. Co. v. Hartford Acc. and Indem. Co., 980 F.2d 120, 122 (2d Cir. 1992); Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 817 F. Supp. 1136, 1154 n.11 (D.N.J. 1993), aff'd in part and remanded on other grounds, 89 F.3d 976 (3d Cir. 1996); Dart Indus., Inc. v. Commercial Union Ins. Co., 52 P.3d 79, 93 (Cal. 2002); Heartland Payment Sys., L.L.C. v. Utica Mut. Ins. Co., 185 S.W.3d 225, 232 (Mo. Ct. App. 2006).

Federal is essentially asking the court to resolve a dispute between it and another insurance company that is not a party to this action. In order to make a finding that Federal is only required to pay a pro rata sum under the Federal policy, this requires the court to determine if there is coverage under the AIG Policy, the amount of that coverage, and the apportioned amount between the two policies in a case where the other insurer is not before this court. Moreover, the "other insurance" clauses in the two policies govern the relationship between AIG and Federal, and have no impact on MNA's right to fully recover under the Federal policy. If the AIG Policy covers the loss at issue in this case, then Federal could potentially pursue a claim for equitable contribution directly against AIG. See Lucas v. Garrett, 41 S.E.2d 212, 214-16 (S.C. 1947) ("The rule of contribution is an equitable rule and is based on the fact that those who insure" the same interest ought to equitably apportion the same liability.) (internal citations and quotations omitted). In sum, disputed issues[4] remain regarding the applicability of the AIG Policy that cannot be decided in this litigation without the presence of AIG. In addition, resolution of the disputes regarding the AIG Policy are not necessary to resolve the case at bar. There is no dispute that the Federal Policy provided coverage for the loss suffered by MNA. Further, the "other insurance" clause has no impact on MNA's right to recover the policy limits for a loss that exceeds the policy limits.

The Federal Policy is a binding contract between MNA and Federal, the failure to pay the full policy limits constitutes a breach, and the damages are the difference between the

[4] MNA argues that the AIG Policy is not a concurrent policy because the AIG Policy: (1) does not comply with the ERISA bond requirements; (2) was not issued to MNA, and MNA is a separate and distinct entity from CGEM; and (3) applies as Difference in Conditions and as Difference in Limits coverage of the local policy. (Pl.'s Mem. Supp. Mot. Summ. J. 2-7, ECF No. 16-1.)

amount paid and the full policy limits provided under the Federal Policy. See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 466 S.E.2d 727, 729-30 (S.C. 1996) (insurer's attempt to evade payment constituted a breach of contract). Based on the foregoing, the court grants MNA's motion for summary judgment and finds that Federal is obligated to pay the full policy limits under the Federal Policy. Thus, the court orders Federal to pay the remaining $2,459,958.00 to MNA.

Therefore, it is

ORDERED that Federal's motion for summary judgment, docket number 13, is denied. It is further

ORDERED that MNA's motion for summary judgment, docket number 16, is granted.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
November 7, 2017