AIG Specialty Insurance Company v. Agee et al

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ORDER & REASONS Before the Court are two motions for summary judgment, one urged by Plaintiff AIG Specialty Insurance Company, and one urged by Defendants James Agee and Shea Harrelson. motions, the Court now rules as follows.

I. BACKGROUND

Plaintiff AIG Specialty Insurance Company

seeking declaratory judgment from the Court that it is has no duty or obligation to pay out a judgment obtained by Defendants i employer, which was insured by AIG. R. Doc. 1 at 2-3. AIG alleges that it was not properly noticed

itself and UTC. Id. at 5-6. As per AIG, the policy required that any claim made against UTC, the

insured, must be reported to AIG during the covered policy period or within ninety days after the expiration of the policy period and neither of which occurred. Id. at 9-11.

a. State Court Judgment This case stems from an employment dispute among Defendants Agee and Harrelson and their former employer, UTC Laboratories LLC. Defendants both began working for UTC Labs on July 1, 2014 as Area Vice Presidents with identical employment contracts. First Federal Complaint, R. Doc. 1-2 at 2. Their employment contracts set forth that they were to be paid base salaries of $10,000 per month, monthly commissions, and quarterly bonuses. Id. at 3. Defendants were paid accordingly until November 2014 when UTC only paid them their monthly base salaries. Id. In December 2014, the Centers for Medicare and Medicaid Services (CMS), a primary source Id. In April 2015, UTC terminated b Lawsuit Stipulations of Fact, R. Doc. 66-5 at 3. 1

Defendants, Agee and Harrelson, ultimately brought suit against UTC in the Eastern District of Louisiana in May Doc. 1-2 at 3; see Agee et al v. UTC Laboratories, LLC, 2:17-cv-04755-JTM-KWR. In that suit,

Agee and Harrelson alleged UTC violated the Louisiana Wage Payment Act and asserted a breach of contract claim under their employment agreements. R. Doc. 1-2 at 4-5.

That federal suit was dismissed without prejudice in early 2018 because the parties no longer maintained diversity, however in October 2017, Agee and Harrelson had also filed a state lawsuit

against UTC in the 24 th

Judicial District Court of Jefferson Parish, Louisiana. See State Court Complaint, R. Doc. 1-3. AIG was not a party to either the first federal lawsuit or the state

1 8 see R. Doc. 66-1 at 12, 13. However, in stipulation attached to this motion, R. Doc. 66-5, Agee and Harrelson indicate the date as April 18, 2015. This discrepancy does not impact the legal analysis and the Court will refer to April 18, 2015 for consistency. lawsuit. AIG participated in the trial and provided representation to their insured. R. Doc. 1 at 7. 2 The state suit proceeded to trial in October 2022 and on December 19, 2022, the State Court District Judge signed a judgment in favor of Agee and Harrelson and against UTC, awarding Agee $1,110,373.34 and awarding Harrelson $2,125,537.35. State Judgment, R. Doc. 1-5.

In status conferences, the parties have informed this Court that the underlying state court judgment is currently on appeal before the Court of Appeal of Louisiana, Fifth Circuit as to quantum, however UTC is now defunct and is not participating in the appeal, so parties remain unsure of how this appeal will proceed. The Louisiana Fifth Circuit heard oral argument on this appeal on October 10, 2023.

b. The Case at Bar judgment, asserting: (1) failure of notice; (2) no duty or obligation under any policy to indemnify,

pay, or reimburse UTC and/or other claimants with respect to the state court judgment; and (3) limitations and exclusions under the policies. Complaint, R. Doc. 1. at 9-13.

From 2015 2020, AIG wa 31, 2015 March 31, 2017; one that spanned March 31, 2017 March 31, 2018; and one that

spanned March 31, 2018 March 31, 2020. R. Doc. 66-1 at 3-4. Following the termination of their employment in April 2015, Agee and Harrelson maintain they demanded their payment from April 18, 2015 onward. AIG avers that the first time UTC, the insured, gave AIG notice of such claim was on September 19, 2017 and that this email notice made a claim under the 2017-2018 insurance

2 Defendants aver that AIG was involved in the state lawsuit even if it was not a named party, for example by paying fees to attorneys representing UTC and other defendants that Agee and Harrelson have since settled with, showing Doc. 7 at ¶ 54. policy. 3

See Complaint, R. Doc. 1 at 5; Email Exhibit, R. Doc. 1-1. AIG alleges failure to provide notice because under the policies, UTC was required to give notice of a claim during the policy or within 90 days of its conclusion, and Complaint, R. Doc. 1 at 5-6.

Defendants Agee and Harrelson generally deny AIG s allegations and assert a number of affirmative defenses, including: (1) claims are barred by the doctrine of estoppel, waiver, or unclean hands; (2) AIG suffered no prejudice as a result of any alleged failure of notice; (3) no policy expressly states that coverage would not be afforded if prompt notice was not provided; (4) limitations and exclusions under the Policy must be strictly construed in favor of coverage; (5) Defendants are the victims of actual or constructive wrongful termination, breach of implied contracts, and employment-related misrepresentations; and (6) failure to state a claim. Answer and Counterclaim, R. Doc. 7 at 5-8.

Agee and Harrelson also asserted a counterclaim against AIG for the state court judgment. Id. at 8-12. This counterclaim contains three counts: (1) that the Directors and Officers Liability (D&O) Policies indemnify directors and officers from liability resulting from state court judgments and thus AIG is liable to UTC and to Defendants; (2) the Employment Practices Liability (EPL) basis of the state court judgment stemming from employment practices violations, and thus AIG

AIG repeatedly withheld consent to

3 AIG in its Complaint, R. Doc. 1, desc 17 attached as R. Doc. 1-1 is dated September 19, 2017. This discrepancy does not impact the legal analysis and the Court will refer to the date as September 19, 2017 for consistency. reasonable offers. Id. at 9-12. See R. Doc. 91. The Court

denied the motion, finding that Defendants sufficiently pleaded a plausible claim for relief. Id.

II. PRESENT MOTIONS

Defendants and AIG have each filed a motion for summary judgment in this matter. AIG the amounts set forth in the state

court judgment. R. Doc. 115. Defendants present four arguments in support of their motion: (1) the 2017-2018 insurance policy covers their claims; (2) the 2017- Practices Liability Section (EPL) covers their claims; (3) the 2017- ors,

Officers and Private Company Liability Insurance Section (D&O) covers their claims; and (4) AIG cannot assert untimely notice of their claims because of estoppel, waiver, and/or unclean hands. R. Doc. 115-1 at 1-2. While there are several insurance policies that span the dispute, Defendants argue that the 2017-2018 policy applies because they argue the claim first arose and was first reported to AIG during that policy period. Id. at 5-

commenced by . . Id. at 6 (quoting the policy, R. Doc. 115-5 at 18). Thus, they argue that their federal complaint filed May 6, 2017, and which was reported to AIG in September 2017, satisfies the notice requirement.

Defendants object to AIG s argument that this September 2017 notice was untimely for several reasons: arose from the lawsuit did not exist in 2015 when Defendants emailed demands to their employers for owed wages; (2) AIG never contested timeliness when providing defense coverage to UTC and its officers in the state court action, coverage which was subject to the same notice requirements as claims; and (3) AIG participated in the trial, settlements, and negotiations throughout that Id. at 10-14. Further, they argue that the policy itself requires the insurer to base a denial of coverage on more than late notice alone and must show prejudice, which it cannot do. Id. at 10. Alleging that AIG deliberately waited until UTC was defunct so that it could avoid paying these claims, Defendants argue that AIG has unclean hands and is estopped and/or has waived any timeliness defense. Id.

Defendants then argue that coverage exists under both the EPL and D&O sections of the policy. They argue the EPL section covers their claims because they were fired in retaliation for asking for their backpay, as was litigated in state court, and the EPL section specifically covers Id. at 14-16. They assert that the EPL -relat as well. Id.

and covered by the D&O section. Id. at 22.

In opposition, AIG argues that the claim arose in April 2015 and not as a result of the May merely stemmed from the underlying demands for pay made in April 2015. R. Doc. 119 at 12-13.

Therefore, because a claim cannot be first discovered twice, the 2015 date controls. AIG additionally refutes any characterization of retaliation, noting that the state court case only addressed breach of contract claims and Louisiana Wage Payment Act claims, never allegations of retaliatory termination. Id. at 21.

AIG s motion urges the Court to grant it summary judgment because the policies do not AIG presents four reported to AIG until September 2017, more than 90 days after the 2015-2017 policy concluded and therefore there is no covera therefore the 2015 date is the first-made date their employment contracts and the policies exclude coverage for breach of contract claims; and

(4) the policies exclude coverage for claims based on payment of wages. R. Doc. 117-1 at 2-3.

AIG points to a number of the policy provisions to bolster their arguments. First, they argue the notice provisions require the claim to both be made and reported to AIG within the same policy Id. at 10-13. AIG takes the position that Defen backpay. Id. at 10. The policy in effect at that time was the 2015-2017 policy, and AIG alleges that

it received no notice from UTC until September 2017 when they received notice of the federal lawsuit. Id. 31, 2017, AIG argues there is no coverage. Id.

Next, AIG points to the D&O and EPL provisions that exclude breach of contract claims,

their pay. Id. at 16-18. AIG then turns to the provisions in both D&O and EPL sections that exclude claims for losses based on unpaid wages and argue that this exclusion operates to bar coverage to Defendants. Id. at 18-20. Lastly, AIG argues that Defendants are not granted a right of direct action under Louisiana law against an insurer because their claims are fundamentally contractual disputes, and the Louisiana framework does not classify them as third-party beneficiaries of the insurance policies. Id. at 20-25.

In opposition, Defendants reiterate their position that the lawsuit filed in May 2017 both fall within the policy period spanning March 2017 March 2018, the notice requirement is

satisfied. R. Doc. 121 at 5-6. In response to the wage exclusion argument, Defendants argue that the amounts they sought in state court may not be considered wages, because while they were paid their salaries, they were not paid bonuses and commissions which are more akin to profit sharing and therefore do not fall under the wage exclusion. Id. at 11-13.

III. APPLICABLE LAW a. Summary Judgment

the movant is the evidence in the light most favorable to the nonmovant. Coleman v. Hous. Indep. Sch. Dist.,

113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion; that is, the absence of a genuine issue as to any material fact or facts. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to come forward with specific facts showing there is a genuine dispute for trial. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586- fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

b. Contract Interpretation and Burden

Louisiana law applies the general rules of contract interpretation to construe insurance policies. Trinity Indus., Inc. v. Ins. Co. of N. Am., 916 F.2d 267, 269 (5th Cir. 1990). intent, as reflected by the words of the policy, determine the extent of coverage. Reynolds v. Select Properties, Ltd., 634 So.2d 1180, 1183 (La. 1994). Words and phrases used in a policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. Id. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. Ledbetter v. Concord Gen. Corp., 665 So.2d 1166, 1169 (La. 1996). Courts interpreting liability policies should -settled that unless a statute or public policy dictates otherwise, the insurers may limit liability and impose such reasonable conditions or

limitations upon the Supreme Services & Specialty Co., Inc. v. Sonny Greer, Inc., 958 So. 2d. 634, 638-39 (La. 2007). Further, when exclusionary provisions Id. at 639.

rests with the insured to prove that an insurance policy covers IberiaBank Corp. v. Illinois Union Insurance Co., 953 F.3d 339, 346 (5th Cir. 2020). However, the burden of proving the applicability of an exclusion rests with the insurer. Jones v. Estate of Santiago, 870 So. 2d 1002, 1010 (La. 2004)).

c. Relevant Louisiana Insurance State Law Framework

These motions argue over the meaning of specific provisions and exclusions and the parties disagree as to whether the bad faith and direct action statutes apply in this case. Accordingly, a t of these relevant provisions and exclusions is in order.

i. Claims Made Policies First, the policies in this matter are claims-made policies. A claims- Matador Petroleum Corp. v. St. Paul Surplus Lines Insurance Co., 174 F.3d 653, 658 n.2 (5th Cir. 1999) (quoting National Union Fire Insurance Co. v. Talcott, 931 F.2d 166, 168 n.3 (1st Cir. 1991)). This is in contrast to an occurrence policy, which is triggered upon the occurrence of an act or omission, regardless of when it is reported to the insurer. Id. As a result, the time at which the insured brings the - made policies examined closely. Id. aims- FDIC v. Booth, 82 F.3d 670, 678 (5th Cir. 1996)). Under Louisiana law, an insurer does not need to show prejudice when it seeks to enforce the notice requirement in a claims-made policy. First American Title Insurance Co. v. Continental Casualty Co., 702 F.3d 1170, 1173-76 (5th Cir. 2013) (explaining that the purpose of the notice provision in claims-made policies is not to prevent prejudice to the insurer but rather to define the scope of coverage).

ii. Direct Action Statute & the Distinction Between Tort and Contract Claims Next, Louisiana Direct Action Statute insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy La. R.S. §22:1269(A). Such action may be brought Id. at 1269(B)(1). The Louisiana Supreme Court has observed that the Direct Action Arrow Trucking Co. v. Continental Insurance Co., 465 So. 2d 691, 700 (La. 1985); Cacamo v. Liberty Mutual Fire Insurance Co., 764 So. 2d 41, 43 (La. 2000). While the statute p La. R.S. §22:1269(A); 15 La. Civ. L. Treatise, Insurance Law & claim might also or might only sound

Courts acknowledge that claims may present multiple theories of recovery, some in tort and some in contract, and courts permit such cases to proceed under the Direct Action Statute. Orleans Parish School Board v. Chubb Custom Insurance Co., 162 F. Supp. 2d 506, 515-16 (E.D. La. 2001) (Clement, J.) (citing Champion v. Panel Era Manufacturing Co., 410 So. 2d 1230, 1235- 36 (La. App. 3 Cir. 1982)). However, even if a claim sounds in tort, if it arises from a breach of contract, courts tend to find that the Direct Action Statute does not provide a cause of action. Mentz Construction Services, Inc., v. Poche, 97 So. 3d 273, 276-78 (La. App. 4 Cir. 2012). Courts determine whether an action is one in contract or one in tort by examining the nature of the underlying claim. Certain Underwriters Lloyds London v. Sea-Lar Mgmt, Inc., 787 So. 2d 1069, 1074- from a breach of a special Ridge Oak

Development, Inc. v. Murphy, 641 So. 2d 586, 589 (La. App. 4 Cir. 1994)). Louisiana courts have described a contractual action promise (implicit or explicit), Davis v. Le Blanc, 149 So. 2d 252, 254 (La. App. 3 Cir. 1963); Mentz Construction Services, Inc., 97 So. 3d at 277-78 (discussing implicit promises in contracts).

One wrinkle under the facts of this case, compounded by its posture in the summary judgment stage, is that the claim here is arguably a lawsuit and the loss a state court judgment whether a LWPA claim constitutes a claim in contract or a claim in statutory tort. Louisiana courts have considered statutory penalties arising from breach of contract claims as contractual in nature, holding such claims to the contractual ten-year prescriptive period. For example, in Wightman v. Ameritas Life Insurance Corp., the Louisiana Supreme Court addressed a question certified by the The court held that, because those claims arise out of contracts, the contractual prescription period

applies. Id. The court supported this decision by pointing to Smith v. Citadel Insurance Co., discussed infra, as well as DePhillips v. Hospital Service District No. 1 of Tangipahoa Parish, 340 So. 3d 817, 821 (La. 2020). Id. at 695-96. In DePhillips, the court found that a violation of a contractually assumed either an express or implied obligation to forgo balance billing and the

obligation not to balance- Id. at 396 (discussing DePhillips).

In determining whether a LWPA violation constitutes a contractual or delictual claim, the Court looks first to Louisiana jurisprudence on actions to recover unpaid wages and how courts Fishbein v. State ex rel. Louisiana

State University Health Sciences Center, 898 So. 2d 1260, 1266 (La. 2005); La. Civ. Code Ann. art. 3494(1). One appellate court discussed the interplay between an employment contract and a could pursue her claims. Monroe v. Physicians Behavioral Hospital, LLC, 147 So. 3d 787, 795

ended. However, her claims are for unpaid wages. These claims were exigible at the time the wages

were earned and payment was due. At that point, Monroe could have complained about any alleged Monroe does not discuss whether the claim for wages is contractual or delictual in nature, however the petition in the matter asserted a breach of contract claim as to her employment contract. Petition at 2-3, Monroe v. Physicians Behavioral Hospital, LLC, No. 566700 (La. Dist. Ct. Mar. 6, 2013). Nevertheless, the court applied the statutory three-year prescriptive period and not the ten-year contractual prescriptive period to her claim, indicating that the wage claim controls over the breach of contract claim, at least for prescriptive purposes. Monroe, 147 So. 3d at 795.

The Louisiana Supreme Court confirms as much in Grabert v. Iberia Parish School Board, 4). In Grabert, the plaintiffs

were Iberia Parish School Board employees who worked under four year employment contracts. Id. that the Board breached their respective contracts by paying them less than they were due under

Id. The trial court found that the three-year prescriptive period applied, and the appellate court reversed on the basis that the ten-year prescriptive period for personal actions, i.e. contract claims, applied. Id. The Supreme Court held that the three-year period applied, reasoning that the fact that there was a breach of contract did not change the underlying nature of the claim, which was one for unpaid wages. Id. at 647. The court reasoned that article 3499, which sets the ten-year prescriptive period for personal actions, is qualified by Id. Further, the court rejecte

wages arise out of breach of contract, oral or written, to pay wages for services reId.

Ultimately, the jurisprudence does not clearly state whether a violation of the Louisiana Wage Payment Act constitutes an action in contract or in tort, and the Court is left to analogize to the foregoing approaches and infer from

During oral argument on October 19, 2023, the parties argued whether a violation of the , analogizing as above to prescription. While there appears no case directly answering this inquiry, a federal district court in Texas addressing a FLSA claim Osborn v. Computer Sciences Corp., 2004 WL 5454227, at *6-7

(W.D. Tex. Oct. 25, 2004) (quoting Byrne v. Commissioner, 883 F.2d 211, 215 (3d Cir. 1989)). owe his employee pursuant to an express or implied employment agreement; it arises by operation of law. Thus, the statutory claim seeks to Id. (quoting Byrne, 883 F.2d at 215). Applying this logic, the LWPA arguably establishes a duty to pay wages, independent from an employment contract. While the contract may be helpful in determining the amount of wages owed, see Monroe, 147 So. 3d 787 (La. App. 2 Cir. 2013), courts appear to treat claims for wages as a violation of a statutory duty imposed by the LWPA and not as a breach of contract.

iii. Bad Faith Statute Finally, certain circumstances. The relevant language of La. R.S. § 22:1973 is:

A. The insurer has an affirmative duty to adjust claims fairly and promptly and to make

a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach. B. Any one of the following acts, if knowingly committed or performed by an insurer,

. . .

(5)Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious,

or without probable cause. The Louisiana Supreme Court has held that third party claimants may in fact have a direct action

Theriot v. Midland Risk Insurance Co., 694 So. 2d 184, 188 (La. 1997) Importantly, the Theriot court held that only

the enumerated rights of action in the statute are available to third-party claimants; that right is not without limit. Id. at 193. However, the Court of Appeal of Louisiana, Fifth Circuit held just the next year that Theriot dicta, and subsequently reversed a does not provide a right of action to third- Paul v. Allstate Insurance Co., 720 So. 2d 1251, 1255-56 (La. App. 5 Cir. 1998), writ denied, 735 So. 2d 640 (La. 1999). Paul would imply that bad faith counterclaim is not permitted under La. R.S. § 22:1973(B)(5), but there exists a plausible argument otherwise, in reliance on Theriot.

The Louisiana Supreme Court has explained that violations of the bad faith statute tend to be contractual claims, at least when asserted by the insured. Smith v. Citadel Insurance Co., 285 So. 3d 1062, 1068-69 (La. 2019) (addressing whether the contractual or delictual prescription claim against its insurer brings a claim in contract. Id. However, when addressing third party

claimants bringing a bad faith claim, the court noted that no such contractual relationship exists between a third party claimant and an insurer, implying that such a claim would instead be delictual. Id. at 1072. Importantly, the court distinguishes Smith from Zidan v. USAA Property and Casulaty Insurance Co., 622 So. 2d 265 (La. App. 1 Cir. 1993), which held a plaintiff asserting a bad faith claim to a one-year (delictual) prescription period. Smith, 285 So. 3d at 1072. The Smith Zidan involved a bad faith claim asserted by a third Id.

IV. DISCUSSION The Court grounds its discussion in the standard for summary judgment, which requires that there be no genuine dispute as to any material fact such that the movant is entitled to most favorable to the nonmovant. Coleman v. Hous. Indep. Sch. Dist., 113 F.3d 528, 533 (5th Cir.

1997). Following a review of the law, briefings, and oral argument, the Court finds a number of factual questions unresolved such that summary judgment is not appropriate at this juncture. For example, the intent of the parties in 2015 is unclear, vague, and therefore a dispute of a material fact. Agee and Harrelson aver that their intent in sending the April 2015 email to their former employers was not that it constitutes resolution. AIG on the other hand argues that they demanded, in writing, their payment owed, and

therefore that constitutes a claim. The Court asked the parties during oral argument whether UTC Laboratories, if it had intended to pay the claim upon receipt of that email, was required to then it had to report the claim. The Court however finds this response vague because if UTC did

ancials, then it finder could reasonably believe that this in fact did not constitute a claim and

therefore UTC did not need to report it to AIG. Alternatively, a reasonable fact finder could conclude the opposite. summary judgment is inappropriate at this time.

Additionally, the Court finds the question of what AIG knew and when as it pertains to the state court suit too factually pregnant to warrant a conclusive finding on waiver of notice. Summary judgment requires evidence be viewed in a light most favorable to the nonmovant and in both cases here, there exists enough factual and evidentiary ambiguity for a reasonable fact finder to find in favor of or against either party. For example, AIG certainly had actual notice of s they were involved (albeit not as a named party) in the state court litigation by virtue of providing defense costs and participating in settlements and mediations. Whether this can constitute waiver or estoppel however, though implicating questions of law, also raise questions of fact, specifically as to whether Agee and Harrelson could have, or should have, added AIG to the suit, or whether shoes following its insolvency.

The Court acknowledges that the law is not perfectly clear as to whether Agee and Harrelson can bring their counterclaim under the Direct Action Statute and Bad Faith Statute, but, pursuant to the foregoing analysis, holds both are permissible. judgment.

New Orleans, Louisiana, this 2nd day of November, 2023.

United States District Judge