

Progressive Express Ins. Co. v. Alpine Towing, Inc.

United States District Court for the Southern District of Florida

March 5, 2019, Decided; March 6, 2019, Entered on Docket

Case No. 18-21387-CIV-WILLIAMS

Reporter

2019 U.S. Dist. LEXIS 36866 *

PROGRESSIVE EXPRESS INS. CO., Plaintiff, vs.
ALPINE TOWING, INC., et al., Defendants.

Counsel: [*1] For Progressive Express Insurance Company, an Ohio corporation, Plaintiff: Stuart Jeffrey Freeman, LEAD ATTORNEY, Freeman, Goldis & Cash, P.A., St. Petersburg, FL.

Alpine Towing, Inc., doing business as, Galatic Towing, Defendant, Pro se, Miami Gardens, FL.

For Drewell A. Zeas, as Personal Representative of the Estate of Leyla Elizabeth Zeas, deceased, Defendant: Matthew Edward Haynes, Lytal, Reiter, Smith, Ivey & Fronrath, LLP, West Palm Beach, FL.

Judges: KATHLEEN M. WILLIAMS, UNITED STATES DISTRICT JUDGE.

Opinion by: KATHLEEN M. WILLIAMS

Opinion

**AMENDED ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

THIS MATTER is before the Court on Progressive Express Insurance Company's ("Plaintiff") Motion for Summary Judgment (DE 33). Defendant Drewell A. Zeas ("Zeas") filed a response (DE 34); Plaintiff replied (DE 38). For the reasons set forth below, Plaintiff's Motion is **GRANTED**.

I. BACKGROUND¹

This is a declaratory judgment action stemming from an insurance coverage dispute. (DE 22). Plaintiff seeks interpretation of an insurance policy that it issued to Alpine Towing, Inc. d/b/a Galactic Towing ("Galactic Towing"). *Id.* More specifically, Plaintiff seeks a judgment declaring that it has no duty to defend or indemnify Galactic Towing in a personal injury lawsuit filed against it in state [*2] court by Defendant Zeas. *Id.*² Plaintiff now moves for summary judgment, arguing that "[d]espite the fact that the tow truck is not listed on the auto coverage schedule of the Commercial Auto Policy issued to Galactic Towing, [and] despite the fact that the tow truck does not meet the definition of an insured auto or a temporary substitute auto, Zeas contends that the Commercial Auto Policy issued to Galactic Towing provides bodily injury liability coverage" (DE 22 at 6).

Larry Saravia is the President of both Galactic

¹This section includes the relevant admitted facts for purposes of summary judgment. In their respective statements of material facts, the parties make various assertions that are supported by the record. In some instances, the parties did not contest their adversary's assertions or the parties contested assertions without citing sufficient materials in the record. The Court deems all of those uncontested—or insufficiently contested—factual assertions to be admitted. *See S.D. Fla. L. R. 56.1(b); Fed. R. Civ. P. 56(c), (e).*

²The Court's prior order (DE 42) misstated the name of the Defendant and the name of the company to which the insurance policy was issued and is therefore **VACATED** and replaced with this Amended Order.

Towing and Alpine Towing of S. FL, Inc. ("Alpine Towing"). [Def.'s Statement of Material Facts ("DSMF"), DE 32 at ¶ 4]. Both companies operate out of the same five locations. *Id.* ¶ 8. Saravia created two separate businesses—one for his "private property impound business" and one for his "police impound business"—because the private property impound business is not required to obtain the same amount of insurance coverage on the tow trucks as is required under the "police contracts." *Id.* ¶ 9; Saravia Dep. 8:22-9:8. The contracts for "police impounds" are with police agencies and require one [*3] million dollars in insurance coverage for the vehicles, whereas the contracts with private companies, such as condominium associations, do not. *Id.* ¶ 11; Saravia Dep. 9:19-10:8.

Progressive issued an insurance policy, under Policy No. 02802826-1, to Galactic Towing, for the policy period from December 11, 2016 to December 11, 2017. DSMF ¶ 1. In addition to the insurance policy issued to Galactic Towing, Progressive also issued an insurance policy, under Policy No. 02796328-1, to Alpine Towing, on which Galactic Towing was listed as an additional insured. *Id.* ¶ 2. The insurance policy issued to Alpine Towing, the business associated with the private contracts, provides for \$300,000.00 in liability coverage, while the policy issued to Galactic Towing, which is associated with the government contracts, provides one million dollars in liability coverage. (DE 33 at 2).

On September 29, 2017, a 2017 Dodge 4500 tow truck, which was being driven by Anthony Russo, an employee of Galactic Towing, was involved in a car crash that resulted in Leyla Elizaveth Zeas's death. *Id.* ¶ 3, 21. Zeas sued Alpine Towing, Anthony Russo, and others in the Circuit Court of the Eleventh Judicial Circuit in and [*4] for Miami-Dade County, Florida, Case No. 2018-004557-CA-01. (DE 22 at ¶ 11). The tow truck involved in the crash was purchased by Galactic Towing on September 7, 2017, but was added to Alpine Towing's insurance policy effective August

29, 2017 because, according to Saravia, that specific vehicle "was only doing small little tows and private property impounds" and therefore did not require a million dollars in coverage. DSMF ¶¶ 12-14; Saravia Dep. 11:5-15.

At the time of the crash on September 29, 2017, Russo's tow truck was listed on the coverage schedule of the insurance policy issued by Progressive to Alpine Towing. *Id.* ¶ 26. The tow truck was not, however, listed on the coverage schedule of the insurance policy issued by Progressive to Galactic Towing at the time of the accident. Progressive does not dispute that the insurance policy issued to Alpine Towing provides \$300,000.00 in bodily injury coverage resulting from the crash. At issue in this action for declaratory judgment is whether the insurance policy issued to Galactic Towing—which provides up to a million dollars in coverage—also applies to the crash.

II. LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, [*5] depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#) (quoting [*Fed. R. Civ. P. 56\(e\)*](#)). The Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of

law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52)).

In opposing a motion for summary judgment, the nonmoving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. See *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The existence of a mere "scintilla" of evidence in support of the nonmovant's position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. [*6] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "A court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, or upon which the non-movant relies, are 'implausible.'" *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 743 (11th Cir. 1996) (citing *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592-94, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

III. DISCUSSION

Progressive contends that at the time of the accident, Russo was not operating an "insured auto" because the tow truck was not specifically described on the declarations page of the insurance policy issued to Galactic Towing, nor did it meet the definition of an "additional auto," "replacement auto," or "temporary substitute auto" under the terms of the policy. (DE 22 at 7). Progressive, therefore, contends that it has no duty to indemnify Galactic Towing under the insurance policy issued to Galactic Towing. *Id.*

A. Duty to Defend

Under Florida law,³ an insurance provider's duty to defend an insured "depends solely on the facts and legal theories alleged in the pleadings and claims against the insured." *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1323 (11th Cir. 2014) (citations omitted). The duty to defend arises when the relevant pleadings allege facts that "fairly and potentially bring the suit within policy coverage." *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995) (citations omitted). The actual facts of the case are not determinative. *Id.* (citing *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810 (Fla. 1st DCA 1985)). [*7] However, "if the pleadings show that there is no coverage or that a policy exclusion applies to bar coverage, the insurer has no duty to defend." *Arpin & Sons, LLC*, 261 F. Supp. 3d at 1252 (citation omitted). Furthermore, the duty to defend is not indefinite and "ceases when it is shown that there is no potential for coverage, *i.e.*, when there is no duty to indemnify." *Scottsdale Ins. Co. v. GFM Operations, Inc.*, 789 F. Supp. 2d 1278, 1284 (S.D. Fla. 2011) (citations omitted).

Progressive does not dispute its duty to defend both Alpine Towing and Galactic Towing under the insurance policy issued to Alpine Towing, under which Galactic Towing is named as an additional insured. (DE 33 at 3).

B. Duty to Indemnify

Unlike the duty to defend, the duty to indemnify "is narrower and is determined by the underlying facts adduced at trial or developed through discovery during litigation." *Stephens*, 749 F.3d at 1324 (quoting *U.S. Fire Ins. Co. v. Hayden Bonded*

³The Court's jurisdiction is based on diversity. (DE 22 at 2). "In diversity actions, the federal court must apply the substantive law of the state in which it sits, 'except in matters governed by the Federal Constitution or by act of Congress.'" *Trailer Bridge, Inc. v. Illinois Nat. Ins. Co.*, 657 F.3d 1135, 1141 (11th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). Thus, Florida law applies to this case.

Storage Co., 930 So. 2d 686, 691 (Fla. 4th DCA 2006)); see also *Victoria Select Ins. Co. v. Vrchota Corp., 805 F. Supp. 2d 1337, 1343 (S.D. Fla. 2011)* ("Typically, evidence extrinsic to the pleadings is needed to evaluate the duty to indemnify."). In order for the duty to indemnify to arise, the insurance policy must cover the alleged incident. *Stephens, 749 F.3d at 1324*. An insurer alleging non-coverage based on an exclusion bears the burden of establishing that the exclusion applies. *Underwriters at Lloyds London v. STD Enterprises, Inc., 395 F. Supp. 2d 1142, 1147 (M.D. Fla. 2005)* (citing *LaFarge v. Travelers Indem. Co., 118 F.3d 1511, 1516 (11th Cir.1997)*).

C. The Galactic Towing Policy

The insurance policy issued to Galactic [*8] Towing by Progressive (the "Galactic Policy") provides, in pertinent part, as follows:

4. "**Declarations**" or "**declarations page**" means the document prepared by **us** listing your policy information, which may include the types of coverage **you** have elected, the limit for each coverage, the cost for each coverage, the specifically described autos covered by this policy, and the types of coverage for each specifically described auto.

5. "**Insured auto**" or "**your insured auto**" means:

a. Any **auto** specifically described on the **declarations page**....

b. An additional **auto** for Part I - Liability To Others and/or Part II — Damage to Your Auto on the date you become the owner if:

(i) **you** acquire the auto during the policy period shown on the **declarations page**;

(ii) **we** insure all **autos** owned by you that are used in your business;

(iii) no other insurance policy provides

coverage for that **auto**; and

(iv) **you** tell **us** within 30 days after you acquire it that you want us to cover it for that coverage.

c. Any replacement **auto** on the date **you** become the owner if:

(i) **you** acquire the auto during the policy period shown on the **declarations page**;

(ii) the **auto** that you acquire replaces one specifically described on the [*9] **declarations page** due to termination of your ownership of the replaced **auto** or due to mechanical breakdown of, deterioration of, or loss to the re-placed auto that renders it permanently inoperable; and

(iii) no other insurance policy provides coverage for that auto.

If we provide coverage for a replacement **auto**, **we** will provide the same coverage for the replacement auto as we provide for the replaced **auto**.

14. "**Temporary substitute auto**" means any auto you do not own while used with the permission of its owner as a temporary substitute for an **insured auto** that has been withdrawn from normal use due to breakdown, repair, servicing, loss or destruction. (DE 33 at 3-5).

Thus, Progressive argues that pursuant to the Galactic Policy, in order for liability coverage to apply, the vehicle in question must meet the definition of an "insured auto." (DE 33 at 8). Pursuant to Definition 5, in order to be an "insured auto" the auto must be specifically described on the declarations page or qualify as an "additional auto" or as a "replacement auto." *Id.* It is undisputed that the tow truck at issue is not listed on the declarations page of the Galactic Policy. The tow truck is, however, specifically [*10] described on the declarations page of the insurance policy issued to Alpine Towing.

The definitions of "additional auto" and "replacement auto" are similar. Each definition requires that "no other insurance policy provides coverage for that auto." In this case, the tow truck was insured under another insurance policy, specifically, the insurance policy issued to Alpine Towing. Therefore, Progressive contends, the tow truck does not meet the requirements of an "additional auto" or a "replacement auto."

The only other way for the tow truck to constitute an "insured auto" under the Galactic Policy is if it meets the requirements of being a "temporary substitute auto." By definition, a temporary substitute auto must substitute for an "insured auto that has been withdrawn from normal use due to breakage, repair, servicing, loss or destruction." In this case, the tow truck at issue was the truck regularly assigned to Anthony Russo. It was designated as Truck 53 and had been used on an almost daily basis by Russo. On the day of the crash, Russo was shown as the operator of Truck 53 on multiple occasions throughout the day. Therefore, Progressive argues, the plain language of the Galactic Policy [*11] makes it clear that the tow truck does not qualify as an "insured auto" because it was Russo's regularly assigned truck that was intended to be permanently driven by him, not a "temporary substitute auto" that was being driven on a short-term basis.

Rather than address any of Plaintiff's substantive arguments regarding the Galactic Policy definitions, Defendant Zeas instead responds by quoting from an endorsement that is not listed on the declarations page of the policy and that is being presented to the Court for the first time in Defendant's response to the motion to dismiss. The additional endorsement that Defendant asks the Court to consider is also unauthenticated, was not verified by any witnesses, and was, apparently, unknown to Plaintiff until Defendant filed the response. The Court addresses Defendant's argument that this endorsement creates a factual dispute below.

D. Progressive has no duty to indemnify Galactic Towing under the Galactic Policy

Here, Zeas does not dispute that the tow truck at issue in this case is not listed on the Galactic Policy declarations page. The Court agrees with Plaintiff's contention that the tow truck also does not meet the requirements of the other [*12] possible definitions that would qualify the tow truck as an insured auto under the Galactic Policy.

First, as discussed above, the tow truck cannot constitute either an "additional auto" or a "replacement auto" under the Galactic Policy because the truck driven by Russo during the crash *is* covered by another policy—the policy that was issued to Alpine Towing, and which Progressive concedes covers the tow truck. Again, Defendant offers no evidence whatsoever to dispute or rebut this argument. In fact, the evidence that the Parties have deduced demonstrates that Saravia purposely listed Russo's tow truck on the Alpine Towing insurance policy because that truck was handling towing business for private companies, rather than towing vehicles under the government contracts. Thus, Russo's tow truck was listed on the Alpine Towing policy with less coverage, rather than the Galactic Towing policy, which offered more coverage as required by the contracts with the government agencies.

Moreover, the Court agrees with Plaintiff's argument that the tow truck cannot qualify as a "temporary substitute auto" under the definition set forth in the Galactic Policy because the evidence adduced in this case [*13] shows that Russo drove the tow truck regularly and that it was intended to serve as his permanent vehicle, not as a short-term replacement for another vehicle. As with the definitional arguments above, Defendant provided absolutely no response to Plaintiff's contention or evidence that would create a genuine issue of material fact as to whether the tow truck involved in the crash is covered under the Galactic Policy.

As to Defendant's contention that the endorsement

on the Galactic Policy creates an issue of fact as to whether the tow truck was covered, this argument is baseless. Even assuming the Court were to consider an argument raised for the first time in Defendant's response to Plaintiff's motion for summary judgment with a "new" version of the insurance policy that has not been previously filed by either Party, the "Index of Endorsements" states that "[a]ll forms appearing in this endorsement section do not automatically pertain to your policy. Only those endorsements whose form numbers appear on your declarations page apply to your policy." (DE 35-1 at 53).

As an initial matter, because the insurance policy attached to Defendant's response that includes the alleged endorsements [*14] is not properly authenticated, this Court is not obligated to consider it in ruling on Plaintiff's motion for summary judgment. *See, e.g., Mendez v. JFK Med. Ctr. Ltd. P'ship, No. 17-80866-CIV, 2018 U.S. Dist. LEXIS 151118, at n.2, (S.D. Fla. Sept. 4, 2018)* (citing *Saunders v. Emory Healthcare, Inc., 360 F. App'x 110 (11th Cir. 2010)* (holding that because exhibits were not properly authenticated, the district court was not required to consider them in opposition to defendant's motion for summary judgment)).

However, even if the Court were to consider the document attached to Defendant's response as the actual Galactic Policy, Defendant's argument is still without merit. The endorsement that Defendant argues is applicable is titled "Any Automobile Legal Liability Coverage Endorsement" and is form Z442 (01/08). *Id.* And the "Index of Endorsements" states that "[a]ll forms appearing in this endorsement section do not automatically pertain to your policy. Only those endorsements whose form numbers appear on your declarations page apply to your policy." (DE 35-1 at 53). Neither the endorsement title nor form number appear in the declarations page of the Galactic Policy. Therefore, even considering Defendant's argument and the additional, unauthenticated materials attached to Defendant's response to the motion, the Court

nonetheless [*15] finds that there is no genuine dispute as to any material fact, including whether the tow truck is covered under the Galactic Policy. It is not. Because Defendant failed to produce any evidence whatsoever that would create a genuine dispute as to any material fact—and failed to respond to any of the substantive arguments in Plaintiff's motion for summary judgment—summary judgment must be granted in favor of Plaintiff.

IV. CONCLUSION

For the reasons stated above, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (DE 33) is **GRANTED**. The Court will enter final judgment separately pursuant to [Rule 58 of the Federal Rules of Civil Procedure](#). All deadlines and hearings are **CANCELED**. All pending motions are **DENIED AS MOOT** and the Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers in Miami, Florida, this 6th day of March, 2019.

/s/ Kathleen M. Williams

KATHLEEN M. WILLIAMS

UNITED STATES DISTRICT JUDGE