UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RLI INSURANCE COMPANY,

Plaintiff,

v. **Case No: 8:20-cv-1143-MSS-AEP**

BAYWALK TITLE INC. d/b/a TITLE INSURORS OF FLORIDA,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Motion for Final Summary Judgment, (Dkt. 27), Defendant's response in opposition thereto, (Dkt. 28), and Plaintiff's reply, (Dkt. 30); and Defendant's Motion for Summary Judgment, (Dkt. 31), Plaintiff's response in opposition thereto, (Dkt. 32), and Defendant's reply. (Dkt. 34) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Plaintiff's Motion for Final Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. Factual Background

This is an insurance coverage action. RLI Insurance Company seeks a declaration that it does not owe a duty to defend Baywalk Title Inc., a title insurance company, in a putative class action pending in the Sixth Judicial Circuit in and for Pinellas County, Florida. (Dkt. 1) The state-court action alleges that Baywalk

improperly charged Antoni Kruk a closing fee when he purchased real estate in Pinellas County. (Dkt. 1-1 at ¶¶ 8-31) Kruk contends that the real-estate contract required the seller, not the buyer, to pay the closing fee. (Id. at ¶¶ 13-15) In particular, the contract allegedly obligated the seller to pay for "Owner's Policy and Charges"—a defined term encompassing the "owner's title policy premium, title search and closing services." (Id. at ¶ 12) Kruk alleges that, despite this contract language, Baywalk charged him (the buyer) a $250 "Closing Services Fee" for the "procurement of title insurance." (Id. at ¶¶ 16, 20)

Seeking to represent a class of potentially "thousands" of individuals, Kruk brings claims against Baywalk for negligence, gross negligence, breach of fiduciary duty, and unjust enrichment. (Id. at ¶¶ 43, 53-90) The sole theory of damages advanced in the state-court complaint is that "[a]s a direct and proximate result of [Baywalk's conduct], [Kruk] and Class Members have been damaged *in the amount of the Closing Service Fee paid by and charged to [Kruk] and Class Members*." (Id. at ¶¶ 60, 67, 80, 90 (emphasis added)) Likewise, each count of the complaint ends with an identical request for a "judgment for damages *in the amount of the total Closing Services Fees paid by and charged to [Kruk] and Class Members*, together with interest and costs and an award of attorney's fees as permitted pursuant to applicable common benefit law." (Id. (emphasis added))

The present action stems from a professional liability policy RLI issued to Baywalk. (Dkt. 1 at ¶ 20) The policy requires RLI to pay, on behalf of Baywalk, "Damages in excess of the Deductible that [Baywalk] shall become legally obligated

to pay because of Claims first made against [Baywalk] during the Policy Period and first reported to [RLI] during the Policy Period, the Automatic Extended Reporting Period, or if applicable, during the Extended Reporting Period, for Wrongful Acts, committed on or subsequent to the Retroactive Date and before the end of this Policy Period, to which this insurance applies." (Dkt. 27-3 at § 1(a)) The policy defines "Claim" as "a demand for money as compensation for a Wrongful Act." (Id. at § 4) "Wrongful Act," in turn, is defined as "any actual or alleged error, omission or negligent act, committed solely in the rendering of or failure to render Professional Services by [Baywalk] or any person or entity for which [Baywalk] is legally liable." (Id.) The policy provides that "Damages"

> means monetary judgments or settlements, including but not limited to compensatory damages, pre-judgment and post-judgment interest that [Baywalk] is legally obligated to pay. Damages *does not include* punitive or exemplary damages or that portion of any multiplied damage award that exceeds the amount multiplied, criminal or civil fines or penalties imposed by law, taxes, matters deemed uninsurable under the law pursuant to which this Policy shall be construed, or *the return, reduction or dispute over any fees, deposits, expenses, costs, or commissions charged or collected by [Baywalk]*.

(Id. at § 4)

The policy also imposes on RLI the "duty to defend any Claim to which this insurance applies, up to the Limit of Liability of the Policy, even if the allegations of the Claim are groundless, false or fraudulent." (Id. at § 3)

B. Procedural History

RLI initiated this action in May 2020, seeking a declaration that the policy does not require it to defend or indemnify Baywalk in the state-court action. (Dkt. 1 at ¶ 28)

RLI contends that, because the policy does not cover "the return, reduction or dispute over any fees . . . charged . . . by" Baywalk, it does not provide coverage for the state-court suit, which seeks the return of unauthorized closing fees. (Id. at ¶¶ 29-33) RLI also alleges that coverage is barred by policy exclusions for (i) claims involving "the gaining by [Baywalk] of any personal profit, remuneration or advantage to which [it] was not legally entitled"; (ii) claims based on "conduct by [Baywalk] that is criminal, fraudulent, dishonest or with the intent to cause damage"; and (iii) claims stemming from "any actual or alleged violation of any . . . unfair trade practices, consumer protection, or other similar law." (Id. at ¶¶ 34-41, 46-49) Baywalk answered the Complaint and asserted a single counterclaim for breach of contract, alleging that RLI breached the policy by failing to provide coverage for the state-court action. (Dkt. 13 at 11-12)

Baywalk moved to dismiss the portion of this action that sought a declaration that RLI owed no duty to indemnify Baywalk in the state-court suit. (Dkt. 12) This Court granted the motion, holding that "RLI's request for a declaration as to indemnification [was] premature because the underlying state-court action remain[ed] pending." (Dkt. 23 at 2) Accordingly, the Court dismissed "the duty-to-indemnify portion of this case . . . without prejudice pending the resolution of the state-court action." (Id.) That action remains pending as of the date of this Order. Kruk v. Baywalk Title, Inc. d/b/a Title Insurors of Florida, 20-001888-CI, Dkt. (Fla. Cir. Ct.).

The Parties have now cross-moved for summary judgment on the duty-to-defend issue. (Dkts. 27, 31) RLI principally contends that it does not owe a duty to

defend the state-court action because "the crux of each count in the underlying complaint is the return of closing fees that were improperly charged to Buyers," and the policy does not cover "the return, reduction, or dispute over any fees charged or collected by [Baywalk]." (Dkt. 27 at 2, 16) Baywalk argues that coverage is required because the state-court action "involves simple negligence claims with a demand for monetary damages over whether lawful charges were collected from the proper person." (Dkt. 31 at 2)

II. LEGAL STANDARD

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted).

When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1320–21 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

III. DISCUSSION

The insurance policy in this action does not provide coverage for "the return, reduction or dispute over any fees, deposits, expenses, costs, or commissions charged or collected by [Baywalk]." (Dkt. 27-3 at § 4) The state-court action for which Baywalk seeks coverage rests entirely on "closing fees improperly charged and collected by [Baywalk] from buyers of real estate transactions throughout the State of Florida." (Dkt. 1-1 at ¶ 1) Thus, because the state-court action is a "dispute over [ ] fees . . . charged by [Baywalk]," RLI does not owe Baywalk a duty to defend that action.

"[A]n insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." Pac. Emp'rs Ins. Co. v. Wausau Bus. Ins. Co., No. 3:05-cv-850-J-32TEM, 2007 WL 2900452, at

*4 (M.D. Fla. Oct. 2, 2007). "[C]ourts look at the insurance policy as a whole and give every provision its full meaning and operative effect." State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1230 (11th Cir. 2004). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." Phila. Indem. Ins. Co. v. Fla. Mem'l Univ., 307 F. Supp. 3d 1343, 1347 (S.D. Fla. 2018). "The mere fact that an insurance provision is complex or requires analysis does not make it ambiguous." S.-Owners Ins. Co. v. Easdon Rhodes & Assocs. LLC, 872 F.3d 1161, 1164 (11th Cir. 2017). Instead, a policy provision "is considered ambiguous if the relevant policy language is susceptible to more than one reasonable interpretation." James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1274 (11th Cir. 2008).

"Under Florida law, the determination of an insurer's duty to defend falls under the so-called 'eight corners rule,' the name of which refers to the four corners of the insurance policy and the four corners of the underlying complaint." Addison Ins. Co. v. 4000 Island Boulevard Condo. Ass'n, 721 F. App'x 847, 854 (11th Cir. 2017).[1] "Put simply, the eight corners rule provides that an insurer's duty to defend its insured against a legal action arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage." Id. In other words, "[t]he allegations within the complaint must state a cause of action that seeks recovery for the type of damages covered by the insurance policy in question." State Farm Fire & Cas. Co. v. Tippett,

[1] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

864 So. 2d 31, 35-36 (Fla. 4th DCA 2003); see also Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc., 286 F.3d 1233, 1261 (11th Cir. 2002) (holding that the duty to defend is triggered when "the underlying facts contained in the complaint can be fairly read to support a claim covered by the indemnification provision"); Selective Ins. Co. of Se. v. William P. White Racing Stables, Inc., 718 F. App'x 864, 868 (11th Cir. 2017) ("[T]he insurer 'is not required to defend if it would not be bound to indemnify the insured even though the plaintiff should prevail in his action.'" (quoting Capoferri v. Allstate Ins. Co., 322 So. 2d 625, 627 (Fla. 3d DCA 1975))). "[A]n insurer is obligated to defend a claim even if it is uncertain whether coverage exists under the policy." Stephens v. Mid-Continent Cas. Co., 749 F.3d 1318, 1323 (11th Cir. 2014). Nevertheless, "an insurer has no duty to defend a suit against an insured if the complaint upon its face alleges a state of facts that fails to bring the case within the coverage of the policy." McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 758 So. 2d 692, 695 (Fla. 4th DCA 1999).

RLI does not owe Baywalk a duty to defend because the allegations in the state-court complaint do not "state a cause of action that seeks recovery for the type of damages covered by the insurance policy in question." Tippett, 864 So. 2d at 35-36. The policy establishes a clear coverage scheme. RLI must pay, on behalf of Baywalk, "Damages" that Baywalk "shall become legally obligated to pay because of Claims first made against [Baywalk] . . . for Wrongful Acts." (Dkt. 27-3 at § 1(a)) Accordingly, coverage exists only if the "Claim" against Baywalk seeks "Damages." The policy provides that "Damages" "means monetary judgments or settlements" but "does not

include . . . the return, reduction or dispute over any fees . . . charged or collected by [Baywalk]." (Id. at § 4) The question is thus whether the state-court complaint seeks "Damages" as defined by the policy. It does not.

The state-court action is a dispute over fees Baywalk charged to purchasers of real estate in Florida. Although the complaint asserts multiple theories of liability—negligence, gross negligence, breach of fiduciary duty, and unjust enrichment—each claim rests on the allegation that Baywalk unlawfully charged buyers a closing fee that should have been charged to sellers. (Dkt. 1-1 at ¶¶ 53-90) Indeed, the first paragraph of the complaint states that the action "arises from closing fees improperly charged and collected by [Baywalk] from buyers of real estate transactions throughout the State of Florida." (Id. at ¶ 1) Moreover, the sole theory of damages articulated in the complaint is that "[a]s a direct and proximate result of [Baywalk's conduct], [Kruk] and Class Members have been damaged *in the amount of the Closing Service Fee paid by and charged to [Kruk] and Class Members*." (Id. at ¶¶ 60, 67, 80, 90 (emphasis added)) The complaint does not identify any other injury traceable to Baywalk's alleged practice of improperly charging closing fees to buyers. Because the state-court action is nothing more or less than a dispute over fees, it does not seek "Damages" as defined by the policy. Thus, there is no possibility of coverage under the policy, and RLI does not owe a duty to defend Baywalk in the state-court action.

Notably, courts interpreting professional liability policies with similar definitions of "damages" have concluded that those policies do not impose a duty to defend suits involving fee disputes. See Clermont v. Cont'l Cas. Co., 778 F. Supp. 2d

133, 137, 144 (D. Mass. 2011) (finding that insurer "had no duty to defend" underlying action because complaint "clearly sought damages and injunctive relief arising from a fee dispute between [insured] and his former employer," and policy defined "damages" to exclude fees "paid or incurred or charged by the insured"); Cont'l Cas. Co. v. Donald T. Bertucci, Ltd., 926 N.E.2d 833, 836, 842 (Ill. App. Ct. 2010) (holding that insurer owed no duty to defend underlying lawsuit because policy defined "Damages" to exclude "legal fees, costs and expenses . . . charged by the Insured," and lawsuit alleged that insured "retained an excessive amount of attorney fees from the settlement proceeds of a medical malpractice action"); Cont'l Cas. Co. v. Brady, 907 P.2d 807, 809, 811 (Idaho 1995) (holding that insurer "did not have a duty to defend" lawsuit alleging insured breached fee agreement by receiving unreasonably high fee because policy did not provide coverage for any "claim for return of fees").

Because there is no possibility of coverage for the state-court action, RLI does not owe Baywalk a duty to defend. Thus, RLI's motion for summary judgment is granted, and Baywalk's motion for summary judgment is denied.

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion for Final Summary Judgment, (Dkt. 27), is **GRANTED**.
2. Defendant's Motion for Summary Judgment, (Dkt. 31), is **DENIED**.
3. The Clerk is **DIRECTED** to enter judgment in favor of Plaintiff and against Defendant. The judgment shall state: "Plaintiff does not owe Defendant a duty

to defend in Kruk v. Baywalk Title, Inc. d/b/a Title Insurors of Florida, 20-001888-CI (Fla. Cir. Ct.)."

4. Following entry of judgment, the Clerk shall **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 27th day of September 2021.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person