UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 12-21961-CIV-ALTONAGA/Simonton

360 CONDOMINIUM B ASSOCIATION, INC.,

Plaintiff,

vs.

UNITED STATES LIABILITY INSURANCE COMPANY, *et al.*,

Defendants.
_______________________________/

ORDER

THIS CAUSE came before the Court on Defendant, Evanston Insurance Company's ("Evanston['s]") Motion for Judgment on the Pleadings ("Motion") [ECF No. 38], filed on October 31, 2012. Plaintiff, 360 Condominium B Association, Inc. (the "Association" or "Plaintiff") filed a Response ("Response") [ECF No. 39], on November 19, 2012, to which Evanston replied ("Reply") [ECF No. 42], on December 6, 2012. The Court has carefully considered the parties' written submissions and applicable law.

I. BACKGROUND[1]

This case arises from a dispute over insurance coverage. The Association is a Florida not-for-profit corporation that operates, manages, and maintains certain condominium properties in Miami-Dade County, Florida. (*See* Compl. ¶ 2 [ECF No. 1-2]). Evanston and its Co-Defendant, United States Liability Insurance Company ("USLI"), are insurance companies that issued policies to the Association. (*See id.* ¶¶ 8–9, 25–26). The Association alleges two causes

[1] The allegations set forth in the Complaint are taken as true.

of action seeking declaratory relief — one against USLI (*see id.* ¶¶ 6–22), and one against Evanston (*see id.* ¶¶ 23–40) — for each Defendant's refusal to defend actions brought against the Association. For its part, Evanston filed an Answer and Counterclaim [ECF No. 17], seeking a declaration that there is no coverage available to the Association for the action Evanston has been asked to defend. (*See id.* 10).

A. Claims Against The Association and The Declarations Sought in This Suit

In July 2006, the developer of the condominium building that the Association now manages and operates entered into a Communication Services Installation and Services Agreement and a Bulk Services Agreement (the "Cable Agreements") with Hotwire, LLC ("Hotwire"). (*See id.* ¶ 12). On June 16, 2010, the Association notified Hotwire that it was terminating the Cable Agreements. (*See id.* ¶ 13). As a result of the termination, Hotwire filed a complaint against the Association in Florida state court on December 7, 2010 (the "First Claim"). (*See id.* ¶ 15).

After the Association notified Hotwire of the termination, but before Hotwire filed its complaint, the Association procured an insurance policy from USLI, which was effective from September 16, 2010 to September 16, 2011. (*See id.* ¶¶ 9, 13, 15). USLI refused to defend the Association because, according to USLI, the applicable policy did not require it to do so. (*See id.* ¶ 18). While the USLI policy was still effective, the Association sought and procured an insurance policy from Evanston. (*See id.* ¶¶ 9, 25). On April 2, 2011 Evanston issued a not-for-profit management liability policy to the Association (the "Policy"),[2] effective from April 2,

[2] The Policy, which is attached to and referenced in the Complaint, is presented to the Court in fragments that are disjointed and out of order. As far as the Court can tell, the applicable portion of the Policy consists of three separate forms, which may be found, in proper sequence, as follows: (1) the "Not-For-Profit Management Liability Policy Declarations" (the "Declarations") [ECF No. 1-2, at 61–63]; (2) the "General Terms and Conditions" (the "General Terms") [ECF No. 1-2, at 67, 66], [ECF No. 1-3, at 1–8]; and (3) the "Directors and Officers and Organization Liability Coverage Part" (the "Subject Coverage Part") [ECF No. 1-3, at 9–13]. For ease of reference, the Court cites to the forms and utilizes the

2011 through April 2, 2012. (*See id.* ¶¶ 23–26).

Then, on May 11, 2012, the Association "held a special election of unit owners of the condominium, pursuant to Fla. Stat. § 718.302(1)(a). Pursuant to this election, over 75% of the unit owners in the subject condominiums voted to terminate the cable agreements with [Hotwire]." (*Id.* ¶ 31). As a result of this special election, the Association notified Hotwire "of the statutory termination of the subject cable agreements" on September 30, 2011. (*Id.* ¶ 32). In return, Hotwire filed a second complaint against the Association in Florida state court and served the Association on November 10, 2011 (the "Second Claim"). (*See id.* ¶ 33).

After the Association informed Evanston of the Second Claim, Evanston responded that the Policy did not obligate Evanston to defend the Association or pay any judgment that might be rendered against the Association. (*See id.* ¶¶ 35-36). As a result of Evanston and USLI's refusals to defend and pay judgments against the Association, the Association filed the instant action. In its Answer, Evanston raises as an affirmative defense that "the action by 75% of the unit owners . . . is an Interrelated Wrongful Act" with the June 16, 2010 notification of the Association's termination of the Cable Agreements. (Answer, 4). Evanston further responds by asserting a Counterclaim against the Association, seeking a declaration that there is no coverage under the Policy for the Second Claim. (*See* Countercl. 10). Evanston now moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing the Complaint and Policy demonstrate Evanston has no duty to defend the Association against the Second Claim because the Second Claim is an excluded claim as that is defined under the Policy. (*See* Mot.

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pagination associated with each form instead of the pagination assigned by the CM/ECF system. Furthermore, the Policy is a poor copy; although the Court assumes certain words are emphasized in the original, the Court cannot determine with precision where such emphasis lies, and, as such, the Court excludes all emphasis.

13).[3]

B. The Evanston Policy

The Policy Evanston issued to the Association provides "Claims Made Coverage," covering "[c]laims that are first made against the Insured during the Policy Period or the Extended Reporting Period, if exercised." (Declarations, at 1). The General Terms provide, "[t]he insurer shall have the right and duty to defend any Claim covered under such Coverage Part, even if any of the allegations are groundless, false or fraudulent. The insurer's duty to defend any Claim shall cease upon exhaustion of the Limit of Liability applicable to such Claim." (General Terms, at 5). The Subject Coverage Part provides organizational coverage to the Association:

> C. Organizational Liability Coverage
>
> The Insurer shall pay on behalf of the Organization all Loss which the Organization becomes legally obligated to pay on account of any Claim first made against the Organization during the Policy Period or the Extended Reporting Period, if exercised, for a Wrongful Act taking place before or during the Policy Period.

(Subject Coverage Part, at 2). The definition of a "Claim" in this portion of the Policy includes, "[a] civil proceeding against any insured commenced by the service of a complaint or similar pleading upon such Insured." (*Id.*). The "Exclusions" section within the Subject Coverage Part, in turn, provides:

> The Insurer shall not be liable under this Coverage Part to pay any Loss on account of, and shall not be obligated to defend, any Claim made against any insured:
>
> A. Based upon, arising out of, or in any way involving any fact, circumstance or Wrongful Act which have been the subject of any written notice given prior to inception of this policy under any prior directors and officers liability or comparable insurance policy or Coverage Part ("Subsection A");

[3] USLI has not moved for judgment on the pleadings.

> B. Based upon, arising out of, or in any way involving any Claim against any Insured which was pending on or existed prior to the respective Pending or Prior Date stated in the Coverage Schedule in Item 5 of the Declarations, or the same or substantially the same fact, circumstance or Wrongful Act alleged or underlying such prior Claim ("Subsection B");
>
> * * *

(*Id.* at 4/5).

The General Terms define "Wrongful Act" as any act, error, omission and other matter defined as a Wrongful Act in each such Coverage Part. (General Terms, at 4). The Subject Coverage Part defines a "Wrongful Act" as "[a]ny actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty by any Insured Person . . . ." (Subject Coverage Part, at 4).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c) "after the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "'Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.'" *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297, 1303 (11th Cir. 2005) (quoting *Riccard v. Prudential Ins. Co.*, 307 F. 3d 1277, 1291 (11th Cir. 2002)). The standard of review for a motion for judgment on the pleadings is "almost identical to that used to decide motions to dismiss." *Doe v. Bd. of Cnty. Comm'rs*, 815 F. Supp. 1448, 1449 (S.D. Fla. 1992) (citing *Miami Herald Pub. Co. v. Ferre*, 636 F. Supp. 970, 974 (S.D. Fla. 1985)). Judgment on the pleadings should be granted where "there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005) (citing *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)). In ruling on the motion, "[a]ll facts

alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party." *Id.*

III. ANALYSIS

Under Florida law,[4] whether an insurance contract creates a duty for the insurer to defend a lawsuit against the insured is "governed by the terms of the insurance policy and the allegations of the complaint." *Colony Ins. Co. v. Barnes*, 410 F. Supp. 2d 1137, 1139 (N.D. Fla. 2005) (footnote call number omitted). During this inquiry, the Court must focus within the four corners of the complaint against the insured and the four corners of the policy; and if the "complaint alleges any claim that, if proven, might come within the insurer's indemnity obligation, the insurer must defend the entire action." *Id.* (footnote call number omitted).

To determine whether a claim may come within an indemnity obligation, the Court must construe the policy. "[A]n insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy. As with all contracts, the interpretation of an insurance contract is a question of law to be determined by the court." *Fabricant v. Kemper Independence Ins. Co.*, 474 F. Supp. 2d 1328, 1330 (S.D. Fla. 2007) (citing *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4th DCA 2002)). "Florida courts have said again and again that insurance contracts must be construed in accordance with the plain language of the policy." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 F.3d 1224, 1227 (11th Cir. 2005) (internal quotation marks and citations omitted). Indeed, the "terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties—not a strained, forced, or unrealistic construction."

[4] The parties agree Florida law applies to construction of the Policy.

Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 736 (Fla. 2002) (quoting *General Accident Fire & Life Assurance Corp. v. Liberty Mutual Ins. Co.*, 260 So. 2d 249, 253 (Fla. 4th DCA 1972)). Furthermore, "[a] court should read an insurance policy as a whole, and endeavor to give each provision its full meaning and operative effect." *Anderson v. Auto-Owners Ins. Co.*, 172 F.3d 767, 769 (11th Cir. 1999) (citation omitted).

If an insurance contract includes an ambiguous term, the term must be "interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy," and "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) (citations omitted). "Under Florida law, an insured bears the burden of proving that a claim is covered within an insurance policy. . . . The burden of proving an exclusion to coverage is, however, on the insurer." *Certain Underwriters at Lloyds v. NOA Marine, Inc.*, No. 8:11-CV-63-T-17TGW, 2012 WL 1623527, at *11 (M.D. Fla. May 9, 2012) (internal citation omitted).

Evanston argues Subsections A and B of the Subject Coverage Part unambiguously exclude any duty to defend the Association against the Second Claim because the Second Claim is related to the First Claim, and as such, is excluded from coverage. (*See* Mot. 9–10). Specifically, Evanston argues Subsection A establishes Evanston has no duty to defend against the Second Claim because the Second Claim relates to a circumstance "that was the subject of a claim against the Association which occurred prior to the policy period." (*Id.* 10). Evanston argues the Second Claim falls within the language of Subsection A because it is: (1) based upon, arises out of, or involves; (2) a fact, circumstance or wrongful act; (3) of which the Association received written notice prior to the inception of the Policy. Although Evanston only needs to establish that one exclusion applies to the Second Claim, Evanston also argues Subsection B relieves it of the duty to defend the Association against the Second Claim. (*See id.* 11–13).

According to Evanston, this is because the Second Claim is based on, arises from, and/or in some way involves the First Claim. (*See id.* 11). The Association argues Evanston is not entitled to judgment on the pleadings, and further contends the Association is "entitled to a partial judgment on the pleadings on the duty to defend." (Resp. 13).

It is undisputed that the First Claim was pending prior to the Policy taking effect, and the Association received written notice of the First Claim prior to the inception of the Policy. The issue presented by Evanston's request for judgment on the pleadings is whether the Second Claim is sufficiently related to the First Claim under the terms of the Policy so as to relieve Evanston of the duty to defend the Association against the Second Claim. *See Fed. Ins. Co. v. Surujon*, No. 07-22819-CIV, 2008 WL 2949438, at *5 (S.D. Fla. July 29, 2008) ("Because the two suits are "Related Claims" under the policy, the only coverage available is that which was available under the policy in effect at the time when the first claim is deemed to have been made."). The Association agrees with this characterization of the issue, asserting that "if the latter claim brought against the Association is related to the initial claim brought by Hotwire, the latter claim would be outside the Evanston policy period." (Resp. 6).

When interpreting policy language that, for example, excludes coverage for "claims arising out of the same or related wrongful acts," *Continental Cas. Co. v. Wendt*, 205 F.3d 1258, 1260 (11th Cir. 2000), courts have found that claims "relate" to each other if the acts underlying the first suit have a "logical connection in any meaningful sense of the word to those [acts] which form the basis of the" second suit, *id.* at 1263 (internal quotation marks omitted). As a court in this district stated:

> [C]ourts analyzing the "relatedness" of claims in situations involving similar policy language consider, among other factors, whether the parties are the same, whether the claims all arise from the same transactions, whether the "wrongful acts" are contemporaneous, and whether there is a common scheme or plan underlying the acts.

> This approach does not require exact factual overlap, or even identical legal causes of action, but rather focuses simply on whether the claims are logically linked by a "sufficient factual nexus."

Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co., No. 07-80908-CIV, 2008 WL 2949492, at *4 (S.D. Fla. July 30, 2008) (citations omitted). Acts are not considered "related" if they arise out of separate factual circumstances and give rise to separate causes of action. *Paradigm Ins. Co. v. P & C Ins. Sys., Inc.,* 747 So. 2d 1040, 1042 (Fla. 3d DCA 2000) (citing *Kopelowitz v. Home Ins. Co.,* 977 F. Supp. 1179, 1188 (S.D. Fla. 1997)).

Here, the parties agree the First and Second Claims involve the same parties (Hotwire and the Association), and the same set of contracts that the Association attempted to cancel (the Cable Agreements). (*See* Mot. 12; Resp. 11). However, the parties disagree whether the First and Second Claims involve the same transactions, a common scheme or plan, or a sufficient factual nexus to logically link them together.

In the Association's view, the Claims "arise from different transactions, which occurred at different times and which involve completely different situations which cannot be said to arise from common schemes, methods, modus operandi or plans." (Resp. 7). In this vein, the Association points to the complaints filed against it and asserts the complaints involve wholly different allegations. In particular, the First Claim includes allegations that the Association engaged in a civil conspiracy with a different cable provider, and the Association's basis for terminating the Cable Agreements was Hotwire's purported material breaches of the parties' agreements. (*See id.* 11). The Second Claim includes no such allegations, and instead arises from "the Association's attempt to cancel the agreements with Hotwire as a result of a vote of its members." (*Id.*). The Association insists these distinctions render the First and Second Claims so attenuated that "an objectively reasonable insured cannot have expected that they would be

treated as a single claim under the policy." (*Id.* 11 (citing *Lehigh Valley Health Network v. Exec. Risk Indemn., Inc.*, No. CIV.A.1999-CV-5916, 2001 WL 21505, at *8 (E.D. Pa. Jan. 10, 2001))).

Viewing the facts in a light most favorable to the Association, as the Court must, Evanston has demonstrated the First and Second Claims are related, given the plain and unambiguous language of the Policy's clauses describing the types of claims that are excluded from coverage. The First and Second Claims arise from an ongoing conflict between Hotwire and the Association involving the Association's attempts to cancel the Cable Agreements. The Association attempted to cancel the Cable Agreements during a relatively short timeframe: the Association first notified Hotwire of the Association's cancellation of the Cable Agreements in June 2010 (*see* Compl. ¶ 13); six months later, in December 2010, the First Claim was served on the Association (*see id.* ¶ 15); another six months later, in May 2011, the Association held the special election (*see id.* ¶ 31); four months after that, in September 2011, the Association notified Hotwire of the second cancellation (*see id.* ¶ 32); and shortly thereafter, Hotwire filed and served the Second Claim in November 2011 (*see id.* ¶ 33). That the First and Second Claims were filed about one year apart is not dispositive in a claims-made policy. *See Vozzcom, Inc. v. Great Am. Ins. Co. of New York*, 666 F. Supp. 2d 1332, 1339 (S.D. Fla. 2009).

Further, while the Association's "course of conduct involved different types of acts, these acts were tied together because all were aimed at a single particular goal." *Continental*, 205 F.3d at 1264. Although the Association attempted cancellation in two distinct ways — first, by arguing Hotwire materially breached the Cable Agreements, and second, by holding a special election — the Association's indisputable singular goal was cancelling the Cable Agreements. It is plain that the cancellation of the Cable Agreements is at the heart of both the First and Second Claims. In light of the Association's clear goal, the Association's argument that it could not reasonably expect the First and Second Claims would be treated as a single claim under the

Policy (*see* Resp. 11), rings hollow. Indeed, the case the Association cites in support of its argument, *Lehigh*, supports the conclusion that the First and Second Claims are related.

In *Lehigh*, the underlying successive claims were filed by two different doctors against a hospital. *See* 2001 WL 21505, at *9. The first claim involved a doctor's allegations that he could not meet the hospital's quotas without filling a vacant position; the second claim involved a different doctor's broader claims that the hospital and other health care providers conspired to keep him out of the market. *See id.* Such claims were found to be unrelated as the suits were "too dissimilar and the nexus between them too attenuated for coverage to be barred as related to a prior claim or litigation." *Id.* Here, by contrast, the First and Second Claims were both filed by Hotwire and both involve the same issue: the Association's cancellations of the Cable Agreements.

Finally, Subsections A and B include much broader language than language contained in policies in which only "related" claims are excluded from coverage. It bears repeating that these Subsections exclude coverage for any claims:

> A. Based upon, arising out of, or in any way involving any fact, circumstance or Wrongful Act which have been the subject of any written notice given prior to inception of this policy under any prior directors and officers liability or comparable insurance policy or Coverage Part;
>
> B. Based upon, arising out of, or in any way involving any Claim against any Insured which was pending on or existed prior to the respective Pending or Prior Date stated in the Coverage Schedule in Item 5 of the Declarations, or the same or substantially the same fact, circumstance or Wrongful Act alleged or underlying such prior Claim;

(Subject Coverage Part, at 4). These exclusionary clauses are to be taken and understood in their ordinary sense, excluding coverage for the range of claims they describe. Such broad language "requires only a tenuous connection" between the First Claim and the Second Claim. *Vozzcom*, 666 F. Supp. 2d at 1340. As the First and Second Claims satisfy the stricter "related" claims

analysis, they certainly bear more than a tenuous connection to each other in that they are both the result of the Association's attempts to cancel the Cable Agreements.

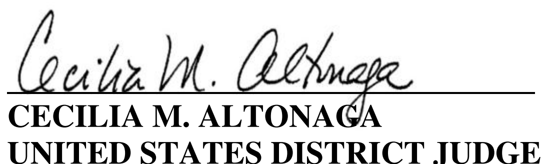
Accordingly, the Second Claim is not covered under the Policy as a matter of law, and Evanston is entitled to a judgment on the pleadings.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 38]** is **GRANTED**. Judgment in favor of Evanston will be entered by separate order.

DONE AND ORDERED at Miami, Florida, this 20th day of December, 2012.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record