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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKETED

CUSHMAN & WAKEFIELD OF
PENNSYLVANIA, LLC,

Plaintiff,

v.

ILLINOIS NATIONAL INSURANCE
PROGRAM, ET.AL., et al

:

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:

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:

:

October Term 2019

No. 885

COMMERCE PROGRAM

Control No. 22044125/22044123

OCT 19 2022

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 18th day of October 2022, upon consideration of Defendant Illinois National Insurance Program's ("Illinois National Insurance") Motion for Summary Judgment, Plaintiff Cushman & Wakefield of Pennsylvania, LLC's ("Cushman & Wakefield") Motion for Partial Summary Judgment, responses and replies, and upon consideration of Nominal Defendant Aspen American Ins. Co.'s ("Aspen American Insurance") Motion to Join Illinois National Insurance Program's Motion for Summary Judgment incorporating Section B and Section D, and as explained in an accompanying Opinion, it is hereby **ORDERED**:

1. Defendant Illinois National Insurance's Motion for Summary Judgment is GRANTED, and judgment is entered in favor of Illinois National Insurance and against Plaintiff Cushman & Wakefield of Pennsylvania LLC as follows:

- a. Count I (breach of contract) and Count III (declaratory judgment) are DISMISSED. Defendant Illinois National Insurance does not have a duty to indemnify Cushman & Wakefield following either judgment or settlement in a federal action captioned *Berish Berger, et. al. v. Cushman & Wakefield of Pennsylvania, et. al.* No. 13-5195 ("Berger Action").

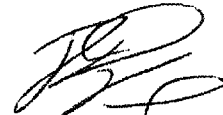
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- b. Defendant Illinois National Insurance continues to have a duty to defend Cushman & Wakefield in the Berger Action through a final adjudication adverse to Cushman & Wakefield that establishes its act was the sole cause of damages.
 - c. Count II (bad faith) is DISMISSED.
- 2. Plaintiff Cushman & Wakefield's Motion for Partial Summary Judgment as to Count 1 breach of contract and Count III declaratory judgment against Illinois National is DENIED.
 - 3. Nominal Defendant Aspen American Insurance's Joinder Motion incorporating Section B (relating to Count I breach of contract) and Section D (relating to Count III declaratory judgment) of Illinois National Insurance's Motion for Summary Judgment is GRANTED and, therefore, Aspen American Insurance is DISMISSED from this case and declaratory judgment is entered in its favor and against Cushman & Wakefield.

BY THE COURT



RAMY I. DJERASSI, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

CUSHMAN & WAKEFIELD OF PENNSYLVANIA, LLC,	:	October Term 2019
	:	
Plaintiff,	:	No. 885
	:	
v.	:	
ILLINOIS NATIONAL INSURANCE PROGRAM, ET.AL.,	:	COMMERCE PROGRAM
	:	
Defendant.	:	Control No. 22044125/22044123

OPINION

Before the court is Defendant Illinois National Insurance Program's ("Illinois National Insurance") Motion for Summary Judgment and Plaintiff Cushman & Wakefield of Pennsylvania LLC's ("Cushman & Wakefield") Motion for Partial Summary Judgment and Nominal Defendant Aspen American Insurance Co's ("Aspen American Insurance") Motion for Summary Judgment.¹ Addressing this insurance coverage dispute and for reasons explained here, Illinois National Insurance's Motion is GRANTED; Cushman & Wakefield's Motion is DENIED and Aspen American Insurance's Motion is GRANTED.

BACKGROUND

1. Insurance Policies

Illinois National Insurance issued an excess insurance policy to Cushman & Wakefield for a one-year period from June 20, 2012 to June 30, 2013 with a liability limit of \$15,000,000. The policy provides a first layer of excess coverage. Primary coverage is through Nottingham Indemnity Inc. ("Nottingham") which had issued a Real Estate Services Professional Liability Insurance Policy ("RESPLI Policy") to Cushman & Wakefield. This RESPLI Policy has a

¹ The court permits Nominal Defendant Aspen American Insurance to join Section B (breach of contract) and Section D (declaratory relief) of Defendant Illinois National Insurance's motion for summary judgment against Plaintiff Cushman & Wakefield.

\$2,000,000 limit with a \$50,000 deductible. Cushman & Wakefield is an additional insured under the RESPLI Policy. Illinois National Insurance's excess coverage policy incorporates RESPLI Policy language, including its exclusions, in defining its duty to defend Cushman & Wakefield as an additional insured under the Nottingham policy.

The Nottingham RESPLI Policy provides that the insurer has the "right and duty to defend any Claim or Suit brought against the Insured seeking Damages on account of a Wrongful Act."² The RESPLI Policy includes the following exclusion:

This Policy does not apply to any Claim alleging intentional wrongdoing, fraud, dishonesty, or criminal or malicious acts of an Insured. However, the Insured will be provided with a defense under the terms of the Policy for such Claims until a final adjudication adverse to the Insured shall establish such act occurred and was the sole cause of Damages. No fact pertaining to an Insured shall be imputed to any other Insured for the purpose of determining the applicability of this exclusion (Exclusion 1).³

2. Underlying Action

In December 2012, Cushman & Wakefield and others were sued in federal court by individuals and entities who alleged that they were tricked into investing at least \$27 million in a never built mixed-use and high-rise development project called "River City" in Philadelphia's Center City near 20th and Market Streets. Cushman & Wakefield was hired by the developers as consultants and appraisers.

The lawsuit was originally filed in the U. S District Court for the Southern District of New York under the caption *Berish Berger, et. al. v. Cushman & Wakefield of Pennsylvania, et. al.* No. 12-9224. ("Berger Action"). The case was transferred to the Eastern District of Pennsylvania

² Section 2 of the Nottingham RESPLI Policy attached to Illinois National Insurance's Motion for Summary Judgment at Exhibit 3.

³ Id. at Exclusion 1.

and remains open. Initially, there were two claims alleged against Cushman & Wakefield: fraudulent misrepresentation and aiding and abetting fraud. The remaining count today is fraudulent misrepresentation.⁴

The Berger Action's Amended Complaint alleges that River City promoters, led by Ravinder Chawla ("Chawla") and Charles M. Naselsky ("Naselsky"), a law partner at Cozen O'Conner and later at Blank Rome, engaged in fraud to convince Berger Action plaintiffs to invest in their project.⁵

The Berger Action plaintiffs allege that Cushman & Wakefield misled them into believing that the River City project could be developed into a 12,000,000 sq. ft. mixed-use development with multiple 600-foot-tall skyscrapers. The plaintiffs contend Cushman & Wakefield knew the project proposed by Chawla and Naselsky was problematic.⁶ They allege that Cushman & Wakefield misrepresented the potential value of the project in various ways including misstating published zoning regulations relating to maximum allowable levels of square footage at the Center City site. According to the Berger Action plaintiffs, Cushman & Wakefield's misrepresentation led them to believe the River City project was not subject to height limitations and they were misled into investing large sums of money when, in fact, the project was doomed.^{7/8} The Berger Action plaintiffs allege Cushman & Wakefield made these

⁴ See Amended Complaint in the Berger Action attached to Illinois National Insurance's Motion for Summary Judgment at Exhibit "6"

⁵ Amended Complaint in the Berger Action- Exhibit "6" ¶¶1,3.

⁶ *Id.* at ¶1.

⁷ At the time the 2006 Appraisal was prepared a height limitation ordinance was pending before City Counsel and became law.

⁸ Exhibit "6" ¶¶67-68,70-72, 150-152, 157.

representations in reckless disregard of the truth.⁹ The plaintiffs allege they relied upon Cushman & Wakefield's false representations and suffered damages.

3. Notice of the Berger Action to the Insurer.

On January 7, 2013, Cushman & Wakefield notified its insurers about the Berger Action. On February 8, 2013, Illinois National Insurance, through Lexington Insurance, an authorized representative, reserved its rights with respect to the Berger Action and issued a coverage position letter to Cushman & Wakefield which provided in part as follows:

"...the two counts asserted against C&W [Cushman] allege that C&W [Cushman] committed fraud. It is our understanding that Exclusion A [Exclusion 1] of the Nottingham Policy operates to bar coverage for any claim alleging intentional wrongdoing, fraud, dishonesty, or criminal or malicious acts of the Insured. **However, a defense will be provided under the terms of the Policy for such claims until a final adjudication adverse to the Insured shall establish such act occurred and was the sole cause of damages.** No fact pertaining to an Insured shall be imputed to any other Insured for the purpose of determining the applicability of the exclusion. **As such, there would be no coverage for a finding that C&W [Cushman] acted fraudulently.**"¹⁰ (Emphasis added).

In late August or early September 2017, Cushman & Wakefield advised Illinois National Insurance that a mediation had been scheduled in the Berger Action for September 11, 2017 and September 12, 2017 to address the fraudulent misrepresentation count. On September 6, 2017, Adam Peacock, an adjuster for Illinois National Insurance, sent a letter to Cushman & Wakefield stating the following:

The Amended Complaint alleges one count only for fraudulent misrepresentation. Moreover, the Amended Complaint asserts that as a proximate result of the fraudulent C&W [Cushman] appraisal Plaintiffs suffered damages. As only fraud is alleged against C&W, any amount awarded could only be on account of fraud and Exclusion No. 1 precludes coverage for this matter, including any indemnity and/or settlement payments. The only exception to the exclusion is for a defense but that exception only applies until such time as a final adjudication adverse to the Insured establishes that such occurred

⁹ *Id.* ¶¶ 150-151, 156, 161-162.

¹⁰ Letter dated February 8, 2013 attached to Illinois National Insurance's Motion for Summary Judgment as Exhibit "11".

which was the sole cause of Damages. Pursuant to this exception and subject to a full and complete reservation of rights, Illinois National has and will continue to provide C&W [Cushman] with a defense for this matter.¹¹

Peacock indicated on behalf of Illinois National Insurance that he would therefore attend the upcoming mediation in good faith.¹² On September 8, 2017, Cushman and Wakefield's coverage attorney wrote to Peacock advising that "if AIG agrees to contribute now to any settlement that may be reached at the upcoming mediation, AIG will save substantial additional expenditures in defense costs, for which it has already agreed it is liable."¹³ In a letter bearing the same date, Peacock stated that "since the only claim actually brought against Cushman is for fraudulent misrepresentation and regardless of whether the underlying conduct is alleged to have been intentional or reckless, Exclusion 1 precludes coverage for this matter. Peacock went on to reserve all rights with respect to the Berger Action on behalf of Illinois National.¹⁴

The Mediation took place as scheduled but no resolution was reached with Cushman & Wakefield.

4. This Action

On October 11, 2019, Cushman and Wakefield filed the instant complaint against Illinois National Insurance and other insurers averring three actions: breach of contract; breach of the duty of good faith and fair dealing; and declaratory judgment. In addition to Illinois National Insurance, the other parties in these actions are Ace American Insurance Company, Aspen

¹¹ Letter dated September 6, 2017 attached to Illinois National's Motion for Summary Judgment as Exhibit "13".

¹² Id.

¹³ Letter dated September 8, 2017 attached to Illinois National's Motion for Summary Judgment as Exhibit "14".

¹⁴ Letter dated September 8, 2017 attached to Illinois National's Motion for Summary Judgment as Exhibit "15".

American Insurance Company, and Liberty Mutual Insurance Company (collectively referred here as "Other Insurers").¹⁵ The policies of these Other Insurers are in excess to Illinois National Insurance's, and they follow the Nottingham RESPLI Policy form. On February 3, 2021, Cushman & Wakefield filed an amended complaint. Illinois National Insurance filed a motion to stay which was denied on April 15, 2021. Pending now is Illinois National Insurance's motion for summary judgment, Cushman and Wakefield's motion for partial summary judgment and Aspen American Insurance Company's motion for summary judgment.

DISCUSSION

I. Illinois National Insurance does not have a duty to indemnify Cushman & Wakefield for damages on fraudulent misrepresentation in the Berger Action either at judgment or settlement.¹⁶

The interpretation of a contract is a matter of law for a court to decide.¹⁷ An insurance policy is a contract that is given the meaning the parties intended based on clear language.¹⁸ When policy terms are unclear, extrinsic evidence is admitted and any remaining ambiguities in a policy are construed in favor of the insured. This is because insurance companies are responsible for the ambiguities as the policy drafters.^{19/20} Courts apply rules of construction favoring insureds when interpreting ambiguous exclusion clauses.²¹

¹⁵ These insurers are identified as nominal defendants in the amended complaint filed in this action.

¹⁶ The parties agree that New York law applies to the claim for breach of contract and that there is no conflict in the laws of Pennsylvania and New York regarding interpretation of an insurance policy.

¹⁷ Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002).

¹⁸ See, Breed v. Ins. Co. of N. Am., 385 N.E.2d 1280, 1282 (N.Y. 1978).

¹⁹ Morgan Stanley Group Inc. v. New Eng. Ins. Co., 225 F.3d 270, 275–76 (2d Cir. 2000).

²⁰ Id. See also Haber v. St. Paul Guardian Ins. Co., 137 F.3d 691, 695 (2d Cir. 1998).

²¹ Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15, 17 (N.Y. 2003).

As a general matter, insurance companies bear the burden of establishing that their exclusions use clear language “subject to no other reasonable interpretation “and which apply in the particular case.”²² Policy exclusions are “given a strict and narrow construction, with any ambiguity resolved against the insurer.”²³ While the insured bears the burden of establishing coverage, the insurer bears the burden of establishing the applicability of exclusions.²⁴

Here, Cushman & Wakefield argues it is entitled to coverage in the Berger Action including at settlement. To prevail, Cushman & Wakefield must show its proposed damages are covered under the policy.²⁵ Exclusion 1 states:

This Policy does not apply to any Claim alleging intentional wrongdoing, fraud, dishonesty, or criminal or malicious acts of an Insured. However, the Insured will be provided with a defense under the terms of the Policy for such Claims until a final adjudication adverse to the Insured shall establish such act occurred and was the sole cause of Damages. No fact pertaining to an Insured shall be imputed to any other Insured for the purpose of determining the applicability of this exclusion.²⁶

This language is unequivocal. Illinois National Insurance does not have a duty to provide coverage to Cushman & Wakefield for damages relating to fraud.

Exclusion 1, however, states an exception for defense costs: the “insured will be provided with a defense under the terms of the Policy for such Claims until a final adjudication adverse to the Insured shall establish such act occurred or was the sole cause of Damages.”

²² Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15, 17 (N.Y. 2003) (citations omitted).

²³ Id.

²⁴ See Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 774 N.E.2d 687, 98 N.Y.2d 208, 218 (N.Y. 2002); AGCS Marine Ins. Co. v. World Fuel Servs., Inc., 187 F. Supp. 3d 428, 438 (S.D.N.Y. 2016).

²⁵ One Reason Road LLC v. Seneca Insurance Co. Inc., 83 N.Y.S. 3d 235, 239 (N.Y. 2018).

²⁶ Exhibit “3”.

Cushman & Wakefield attempts to skirt the clear language of the policy by characterizing the Berger Action as a claim in negligence instead of fraud. This is not persuasive as the Berger Action plaintiffs allege Cushman & Wakefield acted with reckless disregard as to whether its statements were true or false.²⁷ Cushman & Wakefield's position appears to be that absent the actual use of the word "intentional," fraudulent misrepresentation cannot be proven and the amended complaint's averments actually refer to a negligence claim.²⁸ However, plaintiffs' complaint in the Berger Action alleges that Cushman & Wakefield had affirmatively represented that its 2006 Appraisal complied with the Uniform Standard of Professional Appraisal---and that Cushman & Wakefield made this representation knowing that it was false. The complaint in the Berger Action also alleges that Cushman & Wakefield made representations concerning the existence of height limitations leading to an assertion that a completed River City would be worth \$77 million. The plaintiffs allege this representation was made even though Cushman & Wakefield knew this could not be true.²⁹ These explicit allegations of false statement are not allegations of negligence: they are allegations of fraud and have been so understood for years in the broad litigation involving this sorry episode in Philadelphia's real estate history.³⁰

²⁷ In Pennsylvania, the elements of fraud are: 1) a representation; (2) that is material to the transaction at issue; (3) made falsely, with knowledge of its falsity or reckless disregard as to whether it is true or false; (4) with the intent to mislead another person into relying on it; (5) justifiable reliance; and (6) an injury proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 729 A.2d 555, 560 (1999); See also, Gregg v. Ameriprise Financial, Inc., 245 A.3d 637, 645-46 (Pa., 2021).

²⁸ Cushman & Wakefield argues Exclusion 1 does not apply to the Berger Action because the amended complaint there does not allege "intentional" fraud. We disagree since fraud is an intentional tort by legal definition and some level of intentional *mens rea* needs to be proven in all fraud cases. The word "intentional" is not required to sufficiently plead fraud so long as all elements of fraud are averred.

²⁹ Exhibit "6" Berger Amended Complaint ¶¶ 150-151, 154, 156, and 161-162.

³⁰ See Berger v. Cushman & Wakefield of Pennsylvania, Inc., No. CV 13-5195, 2017 WL 3582229 at *1 (E.D. PA. Aug. 18, 2017).

Illinois National Insurance's motion for summary judgment against Cushman & Wakefield's counts for breach of contract and declaratory relief is granted. Cushman and Wakefield's motion for partial summary judgment in its favor on the breach of contract and declaratory judgment claim is denied. And as Aspen National Insurance joins in applicable sections of Illinois National Insurance's summary judgment motion, and as the same analysis governs, the summary judgment motion of Aspen National Insurance is granted against Cushman & Wakefield.

II. Cushman and Wakefield's claim for breach of an implied covenant of good faith and fair dealing fails---as does its claim of statutory bad faith.

Based on the foregoing, there is no arguable merit to Cushman & Wakefield's claims of breach of an implied covenant of good faith and fair dealing or bad faith.³¹ The record shows that Illinois National Insurance has carried out its affirmative obligations to date by funding Cushman & Wakefield's defense as promised.

Nor is there merit to Cushman & Wakefield's statutory bad faith claim. Though Illinois National Insurance's administration of the excess policy in this case is subject to Pennsylvania's Bad Faith Statute at 42 Pa.C.S.A. § 8371, the record is clear there is no violation, let alone one motivated by ill will or self-serving financial interest.³² Illinois

³¹ A separate cause of action for breach of an implied contract for faith and fair dealing is problematic in both Pennsylvania and New York.

See LSI Title Agency, Inc. v. Evaluation Servs., 951 A.2d 384, 392 (Pa. Super. 2008) discussing *JHE, Inc. v. Se. Pennsylvania Transportation Auth.* 2002 WL 1018941 at *7 (Pa. Ct. Com. Pl. 2002). *See Paterra v. Nationwide Mut. Fire Ins. Co.*, 38 A.D.3d 511, 831 N.Y.S.2d 468, 470 (N.Y. 2007) (Breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim.).

³² *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994).

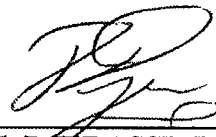
National Insurance had good reason to deny indemnity coverage and the company appropriately reserved its rights while funding Cushman & Wakefield's defense.

CONCLUSION

Illinois National Insurance's Motion for Summary Judgment is GRANTED. Aspen American Insurance Company's Joinder Motion for Summary Judgment is GRANTED and Cushman & Wakefield's Motion for Partial Summary Judgment is DENIED. Declaratory Judgment is entered in favor of Illinois National and Aspen American Insurance Company and against Cushman & Wakefield.

Date: October 18, 2022

BY THE COURT



RAMY I. DJERASSI, J.