UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HIGHLAND HOLDINGS, INC. d/b/a HIGHLAND HOMES, INC., and ROBERT J. ADAMS,

Plaintiffs,

CASE NO. 8:14-CV-01334-SDM-TBM

vs.

MID-CONTINENT CASUALTY COMPANY,

[DISPOSITIVE MOTION]

Defendant. /

MID-CONTINENT CASUALTY COMPANY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant, Mid-Continent Casualty Company ("MCC"), pursuant to Fed. R. Civ. P. Rules 6, 56 and M.D. Loc. R. 3.01, requests this Court to deny the motion for summary judgment filed by Plaintiffs, Highland Holdings, Inc. d/b/a Highland Homes, Inc. and Robert J. Adams (collectively, "Highland") [DE 42]. MCC's opposition is based on the undisputed facts, the language of the MCC policy and the applicable law. MCC's support for this motion is further set forth in the attached Memorandum of Legal Authority in Opposition, which is fully incorporated herein.

MEMORANDUM OF LEGAL AUTHORITY IN OPPOSITION

I. Statement of Disputed Material Facts

In support of its response in opposition to Highland's motion for summary judgment ("MSJ"), MCC files the following Statement of Disputed Material Facts ("SDMF") to those facts Highland claims to be "Undisputed Facts" in its MSJ. *See* DE 42, pp. 2-14. Although Highland does not enumerate its version of undisputed facts, it is separated into sections that MCC will incorporate with enumeration for each section.

A. The Underlying Litigation

1. Highland admitted that State National appointed Mr. Matulis before MCC was even given notice of the Underlying Action. (*See* DE 35, Neal L. O'Toole, Dep. Tr., 6:16-22; Oct. 27, 2015.) MCC had no

involvement in the selection of Mr. Matulis. (*See* DE 46, David Cribb, Dep. Tr., 13:19-21; December 15, 2015.) MCC disputes the factual assertions regarding Ms. Stevens are supported by the citation provided. MCC further disputes that Mr. Matulis' settlement recommendation on April 2, 2014 can be construed as a material fact, since the settlement upon which Highland seeks indemnity from MCC is based on the May 1, 2015 settlement and subsequent entry into a Settlement Agreement and Release with HDS ("Settlement") in the amount of $650,000 – as negotiated by Neal O'Toole. (*See* DE 25, p.3, ¶12; *See also* DE 35, Neal L. O'Toole, Dep. Tr., 19:115-19; Oct. 27, 2015; and DE 35, Exhibit 37, pp.132-150 of 175.) At the time of the underlying mediation, State National was only willing to contribute $25,000, which it believed as a reasonable settlement offer. (*See* DE 46, David Cribb, Dep. Tr., 38:2-13; December 15, 2015.)

2. The factual assertions regarding Jim Matulis leaving his firm are not supported by the citation provided and such assertions are not material facts. Highland did not object to the hiring of the Allen Dyer law firm, which was appointed by MCC and State National to represent Highland and the firm at which Mr. Santurri and Mr. Boyles are attorneys. (*See* DE 35, Neal L. O'Toole, Dep. Tr., 7:8-10; 11:9-12; Oct. 27, 2015.)

3. Neither the declaratory judgment action nor the settlement agreement – as between State National, HDS and Highland ["State National Settlement" *see* DE 35, Exhibit 36] – was "based on the single issue of Highlands Holdings' claim for damages as a result of negligent claims handling that gave rise to an action for estoppel." *See* DE 42, p. 3. State National's declaratory action to determine coverage was resolved by the State National Settlement, including a release by HDS for any claims against State National for the Underlying Action. (*See* DE 35, Neal L. O'Toole, Dep. Tr., 20:17-24; Oct. 27, 2015.) The State National Settlement resolved all matters pertaining to the Underlying Action and declaratory action. *See* DE 35, Exhibit 36, p. 116 of 175 ("As a material inducement for each of the Parties to enter into this Agreement, Home Design hereby warrants and affirms that there are no liens, claims, and/or judgments which would affect Home Design's right to settle and resolve all matters related to the Declaratory Action and/or the Underlying Lawsuit . . .").

B. The Mid-Continent Policy

4. The correct MCC policy is attached to MCC's Counterclaim, which is attached herein as Exhibit 1 to Exhibit A, Affidavit of Jack Jordan. (*See* Exhibit A.) The attached MCC policy is the only policy at issue in this litigation; thus, MCC disputes that any references to prior policies and excess policies are material facts in this litigation. The MCC policy contains the additional relevant language regarding the insuring agreement not included in Highland's statement. (*See* Exhibit A, Form CG 00 01 12 04, p. 5 of 15.)

5. The MCC policy contains the relevant definitions for "advertisement" and "personal and advertising injury." (*See* Exhibit A, Form CG 00 01 12 04, pp. 12, 14 of 15.) MCC disputes Highland's summary of the Underlying Action, as the allegations speak for themselves. (*See generally* DE 32-1.) Moreover, MCC's affirmative defenses, counterclaim and MSJ provide a more complete picture of MCC's arguments against coverage under the MCC policy. (*See generally* DE 26, DE 32 and DE 43.)

C. Mid-Continent's Alleged Failure to Provide Coverage

6. Highland failed to include MCC's reservations of rights letters ("ROR's") dated February, 20, 2014, August 28, 2014 and Nov. 4, 2014. (*See* DE 48-1, Exhibits 2-4, pp. 16-47.)

7. MCC did not fail to request further information and did not have access to the discovery of the Underlying Action via Dropbox. (*See* DE 40, Alycia Stevens, Dep. Tr., 102:17-103:20; 104:13-22; Oct. 20, 2015; *see also* DE 32, p. 1 fn. 1; and DE 48-1, Exhibits 2-4, pp. 16-47.)[1] Additionally, MCC's coverage position was set forth in its ROR's and this litigation, and discovery was obtained from communications with defense counsel and this action. (*See id*.)

[1] Throughout its Statement of Undisputed Facts and MSJ, Highland Homes refers to the depositions testimony of Ms. Stevens and Mr. Pancoast to interpret the policy. This is an issue of law for this Court and their testimony cannot create an issue of fact as to what the policy means. *Granada Ins. Co. v. Ricks*, 12 So.3d 276, 277 (Fla. 3rd DCA 2009) at fn. 1: ("… it is suggested on appeal that the president can properly be deposed concerning his own interpretation of the policy. Because, however, the meaning of an insurance contract is a question of law, and thus not subject to opinion testimony, this contention is wholly without merit.")

8. The Casa Key was not part of the Underlying Action because the amended complaint was never filed and Highland admitted it did not file an answer. (*See generally* DE 25-4, pp.1-3; and DE 39, Ryan Santurri, Dep. Tr., 29:4-16, 30:5; Oct. 29, 2015.) Post rejection, the Winchester and Westin home designs were added to the Settlement. (*See* DE 35, Neal L. O'Toole, Dep. Tr., 32:21-33:5; Oct. 27, 2015.) MCC disputes as irrelevant and not material facts the communications with Ms. Stevens prior to the coverage lawsuit, as MCC's coverage position is set forth in its ROR's, answer, counterclaim and MSJ. (*See generally* DE 26; DE 32; DE 43; SDMF, ¶6; and fn. 1.)

9. MCC's coverage position is set forth in its ROR's, answer, counterclaim and MSJ. (*See generally* Exhibit A; DE 48-1, Exhibits 2-4, pp. 16-47; DE 26; DE 32; and DE 43.) As to Highland's footnote 1, *see* footnote 1 herein. Contrary to the stated fact, the cited testimony indicates Mr. Pancoast's response to counsel's inquiry regarding the significance of when damages must occur, including Mr. Pancoast's response that the policy does not require the damages to take place within the policy period, *but the offense – infringement within the advertisement – must occur during the policy period*. Moreover, Highland fails to include Mr. Pancoast's statement that directly contradicts what Highland asserted wherein he said: "[T]here has been no personal and advertising injury as defined here because there has been no evidence provided of a personal and advertising offense." (*See* DE 41, Kirby Pancoast, Dep. Tr., 24:17-20; Oct. 20, 2015.)

10. MCC's coverage position is set forth in its ROR's, answer, counterclaim and MSJ. (*See generally* Exhibit A; DE 48-1, Exhibits 2-4, pp. 16-47; DE 26; DE 32 and DE 43.) As to Highland's assertion that MCC did not ask for evidence of advertising, *see* SDMF, ¶7. As to Highland assertion regarding Mr. Pancoast's testimony, *see* SDMF, ¶9. As to the cited testimony of Ms. Stevens that Mr. Santurri never provided the actual advertising, such testimony was not limited to Mr. Santurri and applied to Highland total failure to provide the advertisements from the MCC policy period. As to the cited testimony for Mr. O'Toole, *see* footnote 1 herein.

11. *See* SDMF, ¶¶ 4-5; 9 and footnote 1 herein.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HIGHLAND HOLDINGS, INC., et al.,

Plaintiffs,

v. CASE NO. 8:14-cv-1334-T-23TBM

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

FOREWORD

Mid-Continent's response (Doc. 50) to Highland Holdings' motion for summary judgment is disguised as a paper that conforms both to Local Rule 1.05(a), which requires each "paper[] tendered by counsel for filing [to] be typewritten, double-spaced, [and] in at least twelve-point type," and to Local Rule 3.01(b), which limits the length of a response to "not more than twenty (20) pages." Although neither rule explicitly proscribes manipulative letterspacing,[1] the Local Rules assume that counsel engages in no manipulation to evade the effect of the rules and assume counsel's use of the standard space between consecutive letters. Quite transparently, Mid-Continent's response manipulates the space between consecutive characters in the response and adds approximately two words to each line. Tactics such as Mid-Continent's

[1] "*Letterspacing* (also known as *character spacing* or *tracking*) is the adjustment of the horizontal white space between the letters in a block of text." Matthew Butterick, *Typography for Lawyers* 92 (2d ed. 2015).

letterspacing contribute to a burgeoning set of Local Rules, a phenomenon caused not by persnickety judges but by parties' relentless efforts to gain an advantage by subverting a set of rules designed to ensure parity. Counsel is admonished; an attempt to subvert the Local Rules exposes the offending counsel to sanction.

ORDER RESOLVING THE MOTIONS FOR SUMMARY JUDGMENT

Home Design Services, Inc., sued Highland Holdings, Inc., for copyright infringement. Highland Holdings sues (Doc. 1) the insurer Mid-Continent Casualty Company for a declaration that Mid-Continent must reimburse any damages (or settlement money) that might result from the underlying action. Although the initial complaint (Doc. 1) in this action asks only for a declaration (Count I), after settling the underlying action for $650,000 Highland Holdings amends (Doc. 25) the complaint to add a claim for breach of the insurance agreement and for reimbursement of the settlement money (Count II). Mid-Continent counterclaims for a declaration that Mid-Continent need not reimburse any portion of the settlement money.[2] Each party moves (Docs. 42, 43) for summary judgment on each claim.

[2] Mid-Continent asserts seven counterclaims (Doc. 32) against Highland Holdings. However, each purported counterclaim is an argument in support of a claim for a declaration that Mid-Continent "does not owe a duty to indemnify Highland Homes for the $650,000 settlement amount." (Doc. 32 at 15) Under Rule 8(c)(2), Federal Rules of Civil Procedure, "[i]f a party mistakenly designates a defense as a counterclaim . . . the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Mid-Continent's seven counterclaims are construed as arguments in support of one counterclaim for a declaration that Mid-Continent "does not owe a duty to indemnify Highland Homes for the $650,000 settlement amount." (Doc. 32 at 15)