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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

P.F. Chang's China Bistro Incorporated, Plaintiff, v. Associated Industries Insurance Company Incorporated, Defendant.	No. CV-21-01035-PHX-JJT **ORDER**

At issue is Plaintiff P.F. Chang's China Bistro Incorporated's ("P.F. Chang's") Motion for Partial Summary Judgment as to Plaintiff's Status as an "Additional Insured" (Doc. 25), to which Defendant Associated Industries Insurance Company Incorporated ("Associated") filed a Response (Doc. 31), and Plaintiff filed a Reply (Doc. 35). Also at issue is Defendant's Motion for Summary Judgment (Doc. 27), to which Plaintiff filed a Response (Doc. 33), and Defendant filed a Reply (Doc. 36). The Court has reviewed the parties' briefs and finds these matters appropriate for decision without oral argument. *See* LRCiv 7.2(f). For the reasons set forth below, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment.

I. BACKGROUND

Plaintiff, a restaurant chain, filed a Complaint against Defendant, an insurance company, in the Maricopa County Superior Court on May 11, 2021. (Doc. 1-5.) The Complaint raises three claims for relief based on Defendant's refusal to defend Plaintiff in a lawsuit ("the Underlying Action") filed against Plaintiff for an incident that occurred at

one of Plaintiff's restaurants in Miami, Florida, in October 2018.[1] (*Id*. ¶¶ 7-27.) Defendant timely removed the instant action to this Court on June 14, 2021. (Doc. 1.)

The complaint filed in the Underlying Action alleged that Florina Elena Costan ("Ms. Costan") was waiting for a to go order inside Plaintiff's restaurant when one of Plaintiff's employees "negligently dropped a glass that shattered causing a piece of the glass to embed into [Ms. Costan's] eye." (Doc. 29-1, Complaint filed in the Underlying Action, ¶¶ 7-11.)[2] At the time of the incident, Ms. Costan was waiting for a food order made through DoorDash, a digital food delivery platform. (Doc. 26, Plaintiff's Separate Statement of Facts, ¶¶ 1, 8-11.) Ms. Costan's boyfriend, Alexandru Kristian Depner ("Mr. Depner"), was working on behalf of DoorDash at the time and had accepted an order to deliver the food from Plaintiff to the ordering customer. (*Id*. ¶¶ 9-10.) Mr. Depner brought Ms. Costan along with him when he drove to the restaurant. (*Id.* ¶ 10). He waited outside the restaurant while Ms. Costan went inside to pick up the order. (*Id.* ¶ 11) Ms. Costan's injury occurred while she was waiting for the order inside the restaurant. (*Id*. ¶ 12.)

Plaintiff tendered the defense of the Underlying Action to Defendant, who rejected such tenders via its parent and claims administrator. (Doc. 26 ¶¶ 15-16.) Ms. Costan's claims were later settled through a confidential settlement agreement. (*Id*. ¶ 18.)

In its Complaint, Plaintiff alleges: (1) that in rejecting tender of the defense of the Underlying Action, Defendant materially breached an insurance policy ("the Associated Policy") issued to DoorDash, under which Plaintiff was an additional insured; and (2) that Defendant breached the duty to defend and indemnify under the terms of the Associated Policy. (Doc. 1-5 ¶¶ 18-25.) Plaintiff also seeks declaratory relief in the form of a judgement that Defendant materially breached a "Third Party Delivery Service Agreement" between Plaintiff and DoorDash, whereby DoorDash agreed to provide

[1] *Florina Elena Costan v. P.F. Chang's China Bistro, Incorporated*, Eleventh Judicial Circuit Court of Florida Case No. 2018-042407-CA-01.

[2] Defendant requests that the Court take judicial notice of the complaint filed in the Underlying Action, a partially redacted version of which Plaintiff attached as Exhibit I to its Separate Statement of Facts (Doc. 26-9) and an unredacted version of which Defendant attached as Exhibit 1 to its Request for Judicial Notice (Doc. 29-1.) Defendant's request for judicial notice is granted. *See* Fed. R. Evid. 201(b)(2).

insurance coverage for Plaintiff as an additional insured; that Defendant owed Plaintiff a duty to defend and indemnify; and that Defendant is liable for the confidential settlement that Plaintiff paid to settle Ms. Costan's claims. (*Id.* ¶¶ 7, 27; Doc. 26 ¶¶ 1-3.)

The parties do not dispute that Plaintiff is not the named insured of the Associated Policy. (*See* Docs. 25 at 4-7; 27 at 4-9.) Rather, they dispute whether Plaintiff qualifies as an additional insured under the policy such that Defendant owed Plaintiff a duty to defend and/or indemnify in the Underlying Action. (*See id.*) Plaintiff moves for an order granting partial judgment finding that Plaintiff is an additional insured under the policy, leaving to a "future proceeding" the question of whether the policy extends coverage in this circumstance. (Doc. 25 at 1, 4-7.) Defendant moves for summary judgment against Plaintiff on all causes of action in Plaintiff's Complaint against Defendant. (Doc. 27 at 1, 3-9.)

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of North Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative

evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

"A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

III. ANALYSIS

The parties have stipulated, and the Court has ordered, that the central legal issues in this case—whether and to what extent Plaintiff was entitled to defense or indemnity in the Underlying Action under the Associated Policy—shall be determined according to Florida law. (Doc. 22, Stipulation Re Choice of Law; Doc. 23, Order granting the parties' Stipulation.) Because the Court finds that these legal issues are dispositive of all causes of action raised in the Complaint, it will discuss Defendant's Motion for Summary Judgment first as it addresses these issues in full. The Court will then discuss Plaintiff's Motion for Partial Summary Judgment on the limited issue of its status as an "additional insured."

A. Defendant's Motion for Summary Judgment

Defendant argues that it is entitled to summary judgment because the undisputed material facts establish that it had no duty to defend or indemnify Plaintiff in the Underlying Action. (Doc. 27 at 1-9.) As such, Defendant argues, Plaintiff cannot establish each of the elements of any its claims, thereby entitling Defendant to judgment against Plaintiff as a matter of law. The Court addresses the duties to defend and indemnify in turn.

1. Duty to Defend

Under Florida law, "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." *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 442-43 (Fla. 2005). "The duty to defend is a broad one, broader than the duty to indemnify, and '[t]he merits of the

underlying suit are irrelevant.'" *Travelers Indem. Co. of Conn. v. Richard McKenzie & Sons, Inc.*, 10 F.4th 1255, 1261 (11th Cir. 2021) (quoting *Mid-Continent Cas. Co. v. Royal Crane, LLC*, 169 So. 3d 174, 181 (Fla. 4th Dist. Ct. App. 2015)).

Florida follows an "eight corners rule," under which an insured's duty to defend is determined based only on the four corners of the complaint and the four corners of the insurance policy. *See South Winds Constr. Corp. v. Preferred Contractors Ins. Co.*, 305 So. 3d 723, 725 (Fla. 3d Dist. Ct. App. 2020) (citing *Mid-Continent*, 169 So. 3d at 182 ("An insurer's duty to defend arises from the 'eight corners' of the complaint and the policy.")). "If the complaint, fairly read, alleges facts which create potential coverage under the policy, the insurer must defend the lawsuit." *Fun Spree Vacations, Inc. v. Orion Ins. Co.*, 659 So. 2d 419, 421 (Fla. 3d Dist. Ct. App. 1995). But "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. Resid. Prop. and Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. 4th Dist. Ct. App. 1999).

Defendant argues that it had no duty to defend Plaintiff because the complaint filed in the Underlying Action did not allege any fact potentially implicating coverage under the Associated Policy. (Doc. 27 at 4-7.) It is undisputed that Plaintiff is not a named insured. Thus, if Plaintiff were entitled to coverage, it would have to be through one of the policy's blanket additional insured endorsements. (*Id.*; *see* Doc. 33 at 2-4.) The parties agree that the only potentially applicable endorsement is the one titled "ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION," which provides coverage to an additional insured, such as Plaintiff,

> but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
> **A.** In the performance of your ongoing operations; or
> **B.** In connection with your premises owned by or rented to you.

(Doc. 26-4 at 10.) Citing to the Florida Supreme Court's interpretation of a similarly worded endorsement in *Garcia v. Federal Insurance Company*, 969 So. 2d 288 (Fla. 2007),

Defendant argues that the endorsement here limited coverage to an additional insured's vicarious liability for the negligent acts or omissions of the named insured, DoorDash. (Doc. 27 at 5-7.) Defendant argues that because the allegations in the Underlying Action never implicated DoorDash, it had no duty to defend Plaintiff. (*Id*.)

Plaintiff counters that Defendant's interpretation of the duty to defend is too narrow. (Doc. 33 at 2-4.) Plaintiff notes that Florida law requires only that the allegations in the complaint "fairly and potentially bring the suit within policy coverage," and that any doubts about the duty to defend must be resolved in favor of the insured. (Doc. 33, citing *Jones*, 908 So. 2d at 443, and *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 814 (Fla. 1st Dist. Ct. App. 1985).) However, to trigger the duty to defend, the complaint had to have alleged facts that at least potentially implicated coverage under the endorsement, which provides coverage "but only with respect to liability . . . caused, in whole or in part" by the "acts or omissions" of DoorDash or those acting on its behalf. (Doc. 26-4 at 10.)

In *Garcia*, the Florida Supreme Court considered the scope of an additional insured endorsement extending coverage to "any other person or organization with respect to liability because of acts or omissions" of the named insured. 969 So. 2d at 289. The court held that

> [w]hen considered in context, these words clearly indicate that an additional insured is entitled to coverage *concerning* liability that is *caused by* or occurs *by reason of* acts or omissions of the named insured. An additional insured's liability thus must be *caused by* the acts or omissions—that is, the negligence—of the named insured.

Id. at 292. Because the underlying complaint alleged that the additional insured was liable for her own negligence, and did not allege that the named insured was liable for her acts or omissions, the court held that the additional insured was not entitled to coverage. *See id.*

Plaintiff makes no effort to distinguish *Garcia* in its Response. (*See generally* Doc. 33.) Although the additional insured endorsement at issue here is not identical to that in *Garcia*, the Court agrees with Defendant that *Garcia* nonetheless resolves the question

of how to interpret the endorsement in this case. *Garcia* instructs that the clause "liability . . . caused, in whole or in part, by the acts or omissions" of the named insured must be interpreted as referring to the negligence of the named insured. *See* 969 So. 2d at 292. In this context, the subordinate clause "in whole or in part" following "caused"—absent from the endorsement in *Garcia* but present here—clarifies that coverage must be provided even if DoorDash is only partially at fault. *See Cincinnati Specialty Underwriters Ins. Co. v. KNS Group, LLC*, 2022 WL 5238711, at *3 (11th Cir. 2022) ("There is a clear difference between 'caused' and 'caused in part by': the latter term means that even if the complaint alleged [the named insured] was only 1% responsible for causing the faulty workmanship, then [the insurer] would have a duty to defend [the additional insured]."). Further, the introductory phrase "but only"—absent from the endorsement in *Garcia* but present here—underscores that coverage is limited to instances of vicarious liability for DoorDash's negligence. *See Garcia*, 969 So. 2d at 293 (approving the decision in *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), which construed an endorsement providing for coverage "but only with respect to acts or omissions of the named insured," as limiting coverage "to those instances where the acts or omissions—the negligence—of [the named insured] leads to [the additional insured's] liability.")

Here, the plain meaning of the additional insured endorsement is clear and unambiguous. The Court must give effect to this plain meaning, regardless of any other possible interpretations. *See Detroit Diesel Corp. v. Atl. Mut. Ins. Co.*, 18 So. 3d 618, 620 (Fla. 4th Dist. Ct. App. 2009) ("When contractual language is clear and unambiguous, [we] cannot indulge in construction or interpretation of its plain meaning."); *see also Lambert v. Berkley S. Condo. Ass'n, Inc.*, 680 So. 2d 588, 590 (Fla. 4th Dist. Ct. App. 1996) ("[A] true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner.").

Thus, Defendant would have had a duty to defend Plaintiff in the Underlying Action only if Ms. Costan's complaint alleged that an act or omission—that is, the negligence—on the part of DoorDash or those acting on its behalf caused her injury. There is no genuine

issue of material fact on this question: The complaint made no allegations that than any act or omission on the part of DoorDash or those acting on its behalf caused Ms. Costan's injury; DoorDash was not even mentioned. (*See* Doc. 29-1.) The complaint placed liability directly, independently, and exclusively on Plaintiff and no other. Under the four corners of the complaint and the four corners of the policy, Defendant had no duty to defend.

In resisting the dispositive nature of this conclusion, Plaintiff notes that Florida courts have recognized exceptions to the eight corners rule. (Doc. 33 at 4-5.) Plaintiff urges the Court to look beyond the complaint and the policy and consider "extrinsic facts that were made known to [Defendant] that bear on their duty to defend." (*Id.*)

While it is true that Florida courts have recognized "limited exceptions to the 'eight corners rule,'" *South Winds*, 305 So. 3d at 725 n.1, such exceptions have not been clearly defined. *See* R. Hugh Lumpkin & Alex Stern, *We Need A Hard Eight: Florida's Growing Exception to the Eight Corners Rule*, 89 Fla. B.J., 8, 10 (Mar. 2015.) Plaintiff makes no effort to establish any precise exception that applies here. None of the cases Plaintiff cites are analogous. For example, in *Broward Marine Incorporated v. Aetna Insurance Company*, the court considered a negligence claim against the named insured that was not raised in the complaint. 459 So. 2d 330, 330-32 (Fla. 4th Dist. Ct. App. 1984). Here, there were never any subsequent allegations in the Underlying Action that DoorDash or those acting on its behalf were liable. *Orange and Blue Construction Incorporated v. Evanston Insurance Company* is likewise distinguishable because it involved extrinsic documents implicating the named insured's defective work, for which there are no corollaries here. *See* Case No. CV-10-81706, 2020 WL 6323904, at *8 (S.D. Fla. May 29, 2020).

The Court, sitting in diversity jurisdiction and applying Florida law, is not in a position to recognize or expand an exception to a Florida rule in this case. Indeed, in the absence of guidance establishing that an exception to the eight corners rule applies, the Court would run the risk of committing error by considering extrinsic evidence to evaluate the duty to defend. *See, e.g.*, *State Farm Fire & Cas. Co. v. Edgecumbe,* 471 So. 2d 209, 210 (Fla. 1st Dist. Ct. App. 1985) (holding that the trial court erred in considering extrinsic

evidence because the allegations of the complaint control).[3] Even if the Court were permitted to consider the extrinsic facts Plaintiff has proffered, they would not establish that Defendant had a duty to defend. Analyzed under *Garcia*, Defendant's duty to defend under the additional insured endorsement here would have been triggered only by allegations of negligence on the part of DoorDash or those acting on its behalf. Plaintiff has submitted no evidence of any such allegations in the Underlying Action.[4]

In sum, there is no genuine factual issue as to whether the allegations in the Underlying Action "fairly and potentially" brought the suit within coverage under the Associated Policy. *See Jones*, 908 So. 2d at 442-43. As a matter of Florida law, Defendant had no duty to defend Plaintiff in the Underlying Action.

2. Duty to Indemnify

Unlike the duty to defend, which is based on the allegations in the underlying complaint, the duty to indemnify is based on the facts established through discovery or at trial. *U.S. Fire Ins. Co. v. Hayden Bonded Storage Co.*, 930 So. 2d 686, 691 (Fla. 4th Dist. Ct. App. 2006). The former duty is broader than the latter. *See Mid-Continent*, 169 So. 3d at 181. Plaintiff nonetheless argues that "a finding of no duty to defend does not *necessarily* mean there is no duty to indemnify, though that may often be the case." (Doc. 33 at 5-6.)

Plaintiff cites to no case in which a Florida court has found a duty to indemnify absent a duty to defend. Indeed, Florida law is to the contrary. *See Essex Ins. Co. v. Big Top of Tampa, Inc.*, 53 So. 3d 1220, 1224 (Fla. 2d Dist. Ct. App. 2011) ("Because [the insurer] has no duty to defend [the insured] in [the underlying] action against [the insured], [it] has no corresponding duty to indemnify."); *WellCare of Fla., Inc. v. Am. Int'l Specialty*

[3] For this reason, the Court agrees with Defendant that in the absence of an applicable exception to the eight corners rule, Exhibits F, G, H, and K (Docs. 26-6, 26-7, 26-8, and 34-2, respectively) are irrelevant because they relate only to extrinsic facts outside the four corners of the complaint and the policy. (*See* Doc. 31 at 8-9.)

[4] Indeed, if the Court were to consider Plaintiff's extrinsic evidence, fairness would dictate that it also consider the extrinsic evidence proffered by Defendant, which includes an admission by Plaintiff in the Underlying Action that Ms. Costan was not negligent in any respect. (*See* Doc. 38 at 1-2, Ex. A ¶¶ 2, 13, and Ex. B ¶¶ 2, 13.)

Lines Co., 16 So. 3d 904, 906 (Fla. 2d Dist. Ct. App. 2009) ("[T]he duty to indemnify is narrower than the duty to defend and thus cannot exist if there is no duty to defend.").

As discussed, Defendant had no duty to defend Plaintiff in the Underlying Action as a matter of Florida law. Therefore, as a matter of Florida law, Defendant had no corresponding duty to indemnify. *See Essex*, 53 So. 3d at 1224; *WellCare*, 16 So. 3d at 906. Even if that were not the case, Defendant would still be entitled to summary judgment on this issue because, as discussed, Plaintiff has put forth no evidence that would bring the Underlying Action within the coverage of the additional insured endorsement so as to trigger Defendant's duty to indemnify. *See Anderson*, 477 U.S. at 256-57.

3. Entitlement to Summary Judgment on Plaintiff's Claims for Relief

Defendant argues that the duty to defend and duty to indemnify analyses resolve all causes of action in Plaintiff's Complaint. (Doc. 27 at 8.) Because Defendant owed Plaintiff no duties to defend or indemnify, Defendant asserts that there can be no breach of the Associated Policy or the contractual duties arising thereunder, as alleged in the First and Second Claims for Relief. (*Id.*) Defendant contends that the Third Claim for Relief, which seeks a declaratory judgment that Defendant materially breached its contractual duties and is liable for the confidential settlement paid to settle Ms. Costan's claims, is moot because it seeks by way of declaration the same relief as the first two claims. (*Id.*)

The Court agrees. There is no genuine factual dispute as to whether Defendant breached its duties to defend or indemnify, and Plaintiff has failed to allege or create any genuine factual issues regarding the breach of any other contractual duties that Defendant owed to Plaintiff. Therefore, Defendant has shown that Plaintiff is unable to establish each of the elements of any of its causes of action and Defendant is entitled to summary judgment on Plaintiff's Complaint as a matter of law. *See Celotex*, 477 U.S. at 322.

B. Plaintiff's Motion for Partial Summary Judgment

In its Motion for Partial Summary Judgment, Plaintiff seeks an order "finding that Plaintiff PFC is an 'Additional Insured' under the insurance policy at issue in this case,"

but "leaving the further inquiry of whether the policy extends coverage in this circumstance to a future proceeding." (Doc. 25 at 1.) As Defendant notes in its Response (*see* Doc. 31 at 1-2, 4-5), Plaintiff's motion is puzzling because it seems to suggest that whether Plaintiff qualifies as an additional insured is a standalone question separate from the questions of whether Defendant had a duty to defend or to indemnify. For example, Plaintiff asserts, based on its Third Party Delivery Services Agreement with DoorDash, in which DoorDash agreed to add Plaintiff as an additional primary insured, that "Plaintiff must have additional insured status under one of the blanket endorsements issued with [the Associated Policy between DoorDash and Defendant]." (Doc. 25 at 5-6.) That may be true in the most general sense, but in this case Plaintiff's "status" as an additional insured is only dispositive—let alone relevant—in the context of whether Defendant had a duty to defend or indemnify Plaintiff under the blanket additional insured endorsement in the Associated Policy.

As discussed, there is no genuine factual dispute as to whether Defendant had a duty to defend or indemnify Plaintiff under the Associated Policy's additional insured endorsement, and Defendant is therefore entitled to judgment against Plaintiff on all causes of action in the Complaint. For the same reason, Plaintiff is not entitled to a declaratory judgment that Plaintiff qualified as an additional insured.[5]

IT IS THEREFORE ORDERED granting Defendant Associated's Motion for Summary Judgment (Doc. 27) in its entirety.

IT IS FURTHER ORDERED denying Plaintiff P.F. Chang's Motion for Partial Summary Judgment (Doc. 25) in its entirety.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment accordingly and close this case.

Dated this 24th day of October, 2022.

Honorable John J. Tuchi
United States District Judge

[5] Because the Court denies Plaintiff's motion on the merits, it is unnecessary to consider Defendant's argument that the motion is procedurally defective. (*See* Doc. 31 at 2-3.)