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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PREMIER POOLS MANAGEMENT
CORP., a Nevada corporation,

Plaintiff,

v.

COLONY INSURANCE COMPANY, a
Virginia corporation,

Defendant.

No. 2:13-cv-02038-JAM-EFB

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on Plaintiff Premier Pools Management Corp.'s ("Premier Pools") Motion for Partial Summary Judgment (Doc. #12) and Defendant Colony Insurance Company's ("Colony") Motion for Summary Judgment (Doc. #14).¹ Colony filed an opposition to Premier Pools' motion (Doc. #13). Premier Pools filed an opposition to Colony's motion and a Reply to its opposition (Doc. #16). Colony replied (Doc. #17) to Premier

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for March 26, 2014.

1 Pools' opposition. Both parties correctly agree that California
2 law applies to determine whether a duty to defend exists. Cal.
3 Civ. Code § 1646; Frontier Oil Corp. v. RLI Ins. Co., 153
4 Cal.App.4th 1436, 1448 (2007).

5
6 I. FACTUAL AND PROCEDURAL BACKGROUND

7 The First Amended Complaint (Doc. #8) ("FAC") states a sole
8 cause of action against Colony for declaratory relief regarding
9 Colony's alleged breach of its duty to defend Premier Pools. In
10 the FAC, Premier Pools states that it was sued by Premier Pools,
11 Inc. ("PPI") in another action, Premier Pools, Inc. v. Premier
12 Pools Management Corp., dba Premier Pools and Spas, Inc., et al.
13 ("PPI Action"), and, after being notified, Colony refused to
14 observe its duty to defend Premier Pools in the PPI Action.

15 Premier Pools is a corporation organized under the laws of
16 the State of Nevada. Colony Resp. to Premier Pools' Statement of
17 Undisputed Facts (Doc. #13-1) #1. Colony is a Virginia
18 corporation. Id. #2. Colony issued an insurance policy
19 effective November 8, 2010; the policy was later renewed with all
20 relevant terms identical in both policies (collectively "the
21 Policies"), thereby extending the continuous coverage under the
22 Policies through November 8, 2012. Id. 3-4. The Declarations
23 Certificate lists "DP Aquatics Inc. dba Premier Pools Spas &
24 Patio" ("DP Aquatics") as the insured entity under the Policies.
25 Porter Decl. (Doc. #12-3) ¶¶ 3-4, Exh. 1-2. (Doc. #12-4 & 12-5).
26 The application submitted for the Policies listed DP Aquatics as
27 the applicant. Porter Decl. ¶ 5, Exh. 9 (Doc. #12-12). It is
28 undisputed that DP Aquatics is a corporation organized under the

1 laws of the State of California. Premier Pools' Response to
2 Colony's Statement of Facts (Doc. #16-1) #24.

3 Colony had previously defended Premier Pools in another
4 matter, Davis v. Premier Pool and Spas, Gregg Gray, and Premier
5 Pools Management Inc. ("Davis Suit"), even though DP Aquatics was
6 not named as a defendant. Colony's Resp. to Premier Pools'
7 Statement of Undisputed Facts (Doc. #13-1) #7-8. In the PPI
8 Action, PPI accuses Premier Pools of improperly using its
9 trademark and name among other claims. Resp. to SUF (Doc. #16-1)
10 #2. On March 1, 2013, about eight months after the PPI Action
11 was filed and four months prior to the commencement of trial,
12 Premier Pools provided notice to Colony of the suit and requested
13 defense under the terms of the Policies. Id. #26. By letter
14 dated March 28, 2013, Colony notified Premier Pools that it was
15 denying coverage and defense of the PPI Action. Id. #27. After
16 submitting proof of a name change request, on September 19, 2013,
17 the named insured in the Policies was changed to "DP Aquatics
18 Inc./Premier Pools Management Company dba: Premier Pools and
19 Spas." Id. #30-33.

20 Plaintiff brings the present motion seeking a declaratory
21 judgment that Colony owed Premier Pools a defense in the PPI
22 Action and is required to pay all reasonable defense expenses.
23 Premier Pools MSJ at p. 25. Colony brings its own motion seeking
24 judgment as a matter of law in its favor on the grounds that
25 Premier Pools is not an insured under the Policies, and that even
26 if it was, the claims in the PPI Action do not fall within the
27 Policies' coverage for "personal and advertising injury" as
28 alleged by Premier Pools and that any alleged coverage is

1 specifically excluded by the terms of the Policies. Colony MSJ
2 at p. 1.

3 4 II. OPINION

5 A. Legal Standard

6 "An insurer has a very broad duty to defend its insured
7 under California law." Anthem Electronics, Inc. v. Pac.
8 Employers Ins. Co., 302 F.3d 1049, 1054-55 (9th Cir. 2002). The
9 California Supreme Court has stated that an insurer must defend
10 an insured if the underlying suit even "*potentially*" seeks
11 damages within the coverage of the policy at issue. Horace Mann
12 Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993) (citing Gray
13 v. Zurich Ins. Co., 65 Cal.2d 263 (1966)). "The determination
14 whether the insurer owes a duty to defend usually is made in the
15 first instance by comparing the allegations of the complaint with
16 the terms of the policy." Id.

17 B. Judicial Notice

18 Colony requests judicial notice (Doc. #14-2) of two facts,
19 and Premier Pools opposes the request (Doc. #16-4). Colony
20 desires the Court to take notice that Premier Pools is a Nevada
21 corporation and DP Aquatics is a California corporation.
22 Because these facts are undisputed in this case, the Court need
23 not and does not grant the formal request for judicial notice
24 presented by Colony. Premier Pools' Resp. to Colony's Statement
25 of Facts (Doc. #16-1) #1, #24.

26 C. Evidentiary Objections

27 Colony filed Objections (Doc. #13-2) to the declaration of
28 Paul Porter (Doc. #12-3), and Premier Pools responded (Doc. #16-

1 3). The Court hereby sustains the first two objections insofar
2 as they relate to Porter's *interpretation* of the Policies. The
3 Court relies on the Policies themselves to determine whether
4 Premier Pools was an insured under them, rather than conclusory
5 statements made in a declaration. The Court overrules the third
6 objection. The payment authorization form included in Exhibit 9
7 to Porter's Declaration is part of what the Court will consider
8 the "application materials."

9 Premier Pools filed objections (Doc. #16-2) to the
10 declaration of Suzanne Patton (Doc. #14-3). The first objection
11 is sustained. Again, the Court will rely on the facts of the
12 case and the Policies themselves to determine whether Premier
13 Pools is an insured under the Policies, rather than rely on
14 conclusory statements in declarations interpreting them. Premier
15 Pools' second objection is overruled. Patton's statement that
16 her company did not receive the information necessary to make the
17 coverage determination until September 19, 2013, is a statement
18 of fact based on her personal knowledge of what was necessary to
19 make a coverage determination rather than an opinion. It is not
20 rendered an "inadmissible conclusion" pursuant to Federal Rule of
21 Evidence 701.

22 D. Colony's Motion for Summary Judgment

23 Colony bases its motion for summary judgment on three
24 grounds: (1) Premier Pools is not an insured under the Policies,
25 and therefore, has no standing; (2) the claims in the underlying
26 action do not fall within the Policies' coverage under any of
27 the offenses included in the definition of "personal and
28 advertising injury"; and (3) even were the claims covered by

1 certain provisions of the Policies, coverage is barred by
2 Exclusion "i".

3 1. Standing

4 Colony first contends Premier Pools is not an insured under
5 the Policies and therefore lacks standing to bring this action.
6 Col. MSJ at pp. 9-13. It points to the fact that the only entity
7 named in the Policies is DP Aquatics. Colony relies on language
8 from the Policies defining who is covered by its terms:

9 SECTION II - WHO IS AN INSURED

10 1. If you are designated in the Declarations as:

11 . . .

12 d. An organization other than a partnership, joint
13 venture or limited liability company, you are an
14 insured. Your "executive officers" and directors are
insureds Your stockholders are also insureds
. . . .

15 Undisputed Fact #25 (Doc. #16-1). Colony argues that because
16 Premier Pools is a separate corporation, organized under a
17 different state's laws, it does not qualify as an insured under
18 the Policies as the only entity named in the Declarations
19 Certificate is DP Aquatics.

20 In the FAC, Premier Pools states that pursuant to the
21 doctrine of equitable estoppel it is an insured under the
22 Policies. FAC ¶ 16. In its opposition, Premier Pools restates
23 this argument but also contends that Colony (or its agent)
24 "mistakenly failed" to list Premier Pools on the Declarations
25 Certificate. Opp. to Col. MSJ (Doc. #16) at pp. 1-6. Premier
26 Pools insists the Court should therefore reform the Policies to
27 list Premier Pools as an insured. However, Premier Pools may not
28 assert a theory of its insured status by seeking a remedy,

1 reformation of the contract, which was not mentioned in its
2 complaints, for the first time in its opposition to the opposing
3 party's motion for summary judgment. Oyarzo v. Tuolumne Fire
4 Dist., 955 F. Supp. 2d 1038, 1068-69 (E.D. Cal. 2013); Navajo
5 Nation v. U.S. Forest Serv., 535 F.3d 1058, 1079-80 (9th Cir.
6 2008). The Court therefore need not address the reformation
7 argument and moves to Premier Pools' theory that it should be
8 considered an insured based on the doctrine of equitable
9 estoppel.

10 "A valid claim of equitable estoppel consists of the
11 following elements: (a) a representation or concealment of
12 material facts (b) made with knowledge, actual or virtual, of the
13 facts (c) to a party ignorant, actually and permissibly, of the
14 truth (d) with the intention, actual or virtual, that the
15 ignorant party act on it, and (e) that party was induced to act
16 on it.' (13 Witkin, Summary of Cal. Law [(10th ed. 2005)]
17 Equity, § 191, pp. 527-528.)" Advanced Network, Inc. v. Peerless
18 Ins. Co., 190 Cal. App. 4th 1054, 1067 n.5 (2010)

19 Premier Pools contends that the first element is established
20 because Colony misrepresented or concealed the fact that Premier
21 Pools was not an insured either (1) when Colony calculated the
22 premiums on the Policies based on Premier Pools' revenues and
23 accepted payments from Premier Pools for those premiums, or
24 (2) when Colony defended Premier Pools in the Davis Suit. FAC ¶¶
25 12-17; Opp. at pp. 1-2, 4-6.

26 The Court finds there is no evidence that Colony ever
27 misrepresented to Premier Pools that it was an insured under the
28 Policies or concealed the fact that it was not. The Supreme

1 Court of California has held:

2 Insurance policies are contracts and, therefore, are
3 governed in the first instance by the rules of
4 construction applicable to contracts. Under statutory
5 rules of contract interpretation, the mutual intention
6 of the parties at the time the contract is formed
7 governs its interpretation. ([Cal.] Civ.Code,
8 § 1636.) Such intent is to be inferred, if possible,
9 **solely from the written provisions of the contract.**
10 (Id. § 1639.) The "clear and explicit" meaning of
11 these provisions, interpreted in their "ordinary and
12 popular sense," controls judicial interpretation
13 unless "used by the parties in a technical sense, or
14 unless a special meaning is given to them by usage."
15 (Id. §§ 1638, 1644.) **If the meaning a layperson would
16 ascribe to the language of a contract of insurance is
17 clear and unambiguous, a court will apply that
18 meaning.**

11 Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 666-67
12 (1995) (emphasis added). The Declarations Certificate explicitly
13 list DP Aquatics as the only insured. Section II(1)(d) of the
14 Policies clearly states that only the named insured (and its
15 officers, directors, and shareholders) is covered by the terms of
16 the Policies. Undisputed Fact #25 (Doc. #16-1). The Policies
17 were even renewed with the same party listed as the insured.

18 The Court does not find this language ambiguous or a
19 misrepresentation or concealment of Premier Pools' insured
20 status. Despite the curious decision of Colony to defend Premier
21 Pools in the previous matter, the Court cannot ignore the plain
22 language of the contract to extend coverage to another, unnamed
23 party. See Advanced Network, Inc., 190 Cal. App. at 1066-67
24 (discussing the well-settled principle that estoppel cannot be
25 used to create coverage under an insurance policy where such
26 coverage did not initially exist). Therefore, Premier Pools is
27 not an insured under the Policies, and thus, Colony has no duty
28 to defend it in the PPI Action. Accordingly, Colony's motion for

1 summary judgment is granted on the sole cause of action in the
2 FAC.

3 Given that the Court finds Premier Pools is not an insured
4 under the Policies, it is unnecessary to address Colony's
5 remaining arguments regarding the coverage provisions within the
6 Policies upon which Premier Pools relies. Similarly, because the
7 Court finds Premier Pools is not entitled to coverage under the
8 Policies, its Motion for Partial Summary Judgment seeking a
9 declaratory judgment that Colony owed it a defense and is
10 required to pay all reasonable defense expenses is denied.

11
12 III. ORDER

13 For the reasons set forth above, the Court GRANTS Colony's
14 Motion for Summary Judgment and DENIES Premier Pools' Motion for
15 Partial Summary Judgment.

16 IT IS SO ORDERED.

17 Dated: April 4, 2014

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20 JOHN A. MENDEZ,
21 UNITED STATES DISTRICT JUDGE
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