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28UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIAPUBLIC SERVICE MUTUAL
INSURANCE CO.,

Plaintiff,

v.

LIBERTY SURPLUS INSURANCE
CORPORATION and DOES 1 through
10, inclusive,

Defendants.

No. 2:14-cv-00226-MCE-KJN

ORDER

On August 25, 2016, this Court issued its Memorandum and Order (ECF No. 35) denying in its entirety the Motion for Summary Judgment (ECF No. 22) filed by Defendant Liberty Surplus Insurance Corporation (“LSIC”). Through the Motion now before this Court, (ECF No. 36) Defendant LSIC asks the Court to reconsider its decision pursuant to Federal Rule of Civil Procedure 59¹ and Eastern District Local Rule 230(j), on grounds 1) that there has been an intervening change in controlling law; and 2) that the Court committed “clear error” in its initial decision which made that decision manifestly unjust.

¹ While Defendant’s Motion is ostensibly brought under Rule 59(e), that Rule applies to motions to alter or amend a judgment already entered, and consequently is inapplicable to the present motion, which seeks reconsideration of an order denying summary judgment. The case cited by Defendant for treatment under Rule 59(e) deals with reconsideration of an order granting summary judgment, as opposed to the posture here where summary judgment was denied. See *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). Defendant’s motion is properly brought under Rule 54(b) and will be considered accordingly.

1 A court should not revisit its own decisions unless extraordinary circumstances
2 show that its prior decision was wrong. Christianson v. Colt Indus. Operating Corp.,
3 486 U.S. 800, 816 (1988). This principle is generally embodied in the law of the case
4 doctrine. That doctrine counsels against reopening questions once resolved in ongoing
5 litigation. Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369 (9th Cir.
6 1989) (citing 18 Charles Aland Wright & Arthur R. Miller, Federal Practice and Procedure
7 § 4478). Nonetheless, a court order resolving fewer than all of the claims among all
8 the parties is "subject to revision at any time before the entry of judgment adjudicating all
9 the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). That
10 includes an order denying a motion for summary judgment, which is "generally
11 interlocutory and subject to reconsideration by the court at any time." Preaseau v.
12 Prudential Ins. Co. of America, 591 F.2d 74, 79-80 (9th Cir. 1979); Andrews Farms v.
13 Calcot, Ltd., 693 F. Supp. 2d 1154, 1164 (E.D. Cal. 2010). Where reconsideration of a
14 non-final order is sought, the court has "inherent jurisdiction to modify, alter or revoke it."
15 United States v. Martin, 226 F.3d 1042, 1048-49 (9th Cir. 2000), cert. denied, 532 U.S.
16 1002 (2001). The major grounds that justify reconsideration involve an intervening
17 change of controlling law, the availability of new evidence, or the need to correct a clear
18 error or prevent manifest injustice. Pyramid, 882 F.2d at 369.

19 Defendant LSIC's reconsideration here is premised on two contentions. LSIC first
20 argues that new California precedent establishes that an insurer has no subrogation
21 claim for bad faith where its insured suffered no damage. Second, according to LSIC,
22 this Court committed clear error in failing to find as a matter of law on summary judgment
23 that LSIC had no duty to defend or indemnify FPI Management Company ("FPI"), the
24 company who managed the apartment complex where the underlying injury occurred for
25 its owner, Fair Oaks Fountains, LLC ("FOF"). As set forth below, the Court does not
26 believe either argument merits reconsideration.

27 Turning initially to the viability of Plaintiff's bad faith claim, LSIC points to National
28 Union Ins. Co. v. Tokio Marine and Nichido Fire Ins. Co., 233 Cal. App. 4th 1348 (2015),

1 a decision from the California's Second District Court of Appeal rendered after the
2 subject motion for summary judgment was submitted on or about January 14, 2015.
3 LSIC contends that the decision represents a change in controlling law, which makes
4 reconsideration proper.

5 National Union involved a personal injury products liability claim stemming from a
6 defective tire manufactured by Yokohama and sold by Costco. Plaintiff National Union,
7 an excess insurer for Costco, stepped in and assumed Costco's defense after
8 Yokohama's own products liability carrier, Tokio Marine, failed to do so. National Union
9 settled the claims against Costco on the first day of trial and then filed a complaint in
10 subrogation against Tokio Marine to recover the settlement monies it paid on Costco's
11 behalf.

12 In addition to subrogation claims for contribution and for express contractual
13 indemnity, National Union included a claim for bad faith as Costco's subrogee on
14 grounds that Tokio Marine's products liability policy named Costco as an additional
15 insured. The trial court sustained Tokio Marine's demurrer on grounds that because
16 National Union had stepped in to protect Costco's interest and settle the claim, Costco
17 itself had suffered no damage from which a subrogation claim could flow in bad faith.
18 On appeal, the Second District agreed that the demurrer had been properly sustained,
19 reasoning that subrogation "only permits the paying insurer to be placed in the shoes of
20 the insured and to pursue recovery from third parties responsible to the insured for the
21 loss for which the insurer was liable and paid." Id. at 1362, citing Gulf Ins. Co. v. TIG
22 Ins. Co., 86 Cal. App. 4th 422, 432 (2001), The National Union court consequently
23 found that in the absence of any harm to Costco, its insurer could not pursue a bad faith
24 claim on Costco's behalf. Id.

25 While LSIC urges this Court to follow National Union on grounds that it is
26 "California precedent" deciding the "precise issue" also present here as to Plaintiff's
27 claim for breach of the implied covenant of good faith and fair dealing, this Court must
28 initially point out that as a decision stemming from the California Court of Appeal,

1 National Union is not binding in resolving the present matter. Instead, in applying state
2 law in a diversity case like this one, the undersigned is bound only by decisions of the
3 highest state court, here the California Supreme Court. Evanston Ins. Co. v. Atain
4 Specialiy Ins. Co., 2017 WL 2311401 at * 4 (N.D. Cal. May 26, 2017). If the highest
5 court has not itself decided the issue, it is the responsibility of a federal court sitting in
6 diversity to predict how that court would rule. Id. In doing so, while this Court can look
7 for guidance from the decisions of state appellate courts in extrapolating how the
8 California Supreme Court would rule on this issue, it is not bound to do so if it believes
9 the Supreme Court would not follow a lower appellate ruling. See id.

10 Against this backdrop, the Court is unpersuaded by the Second District's decision
11 in National Union. In its August 25, 2016, Memorandum and Order, it relied on a First
12 District California Court of Appeal decision, Interstate Fire & Cas. Co. v. Cleveland
13 Wrecking Co., 182 Cal. App. 4th 23 (2010). In Interstate, like the present matter, the
14 terms of a construction contract obligated one party to provide indemnity for another with
15 respect to liability for construction operations. After the contemplated indemnitor,
16 Cleveland, failed to provide the required insurance, the indemnitee's carrier, Interstate,
17 accepted the tender of defense and funded both the defense and settlement of the
18 underlying personal lawsuit. When Interstate sued Cleveland for breach of contract as
19 its insured's subrogee, Cleveland demurred on grounds, inter alia, that because
20 Interstate had fully compensated the indemnitee, it could not sue for subrogation on the
21 indemnitee's behalf. The Interstate court squarely rejected this contention, stating that
22 "Cleveland's insistence that [the insured] suffered no loss because Insterstate paid [the
23 insured's employee], and Interstate therefore suffered no loss because it stands in the
24 shoes of its insured, is circular and erroneous." Id. at 35, n.3. As the Court observed, if
25 Cleveland's "Illogical" contention were accepted "no insurer could ever state a cause of
26 action for subrogation in order to recover amounts it paid on behalf of its insured,
27 because of the very fact that it had paid amounts on behalf of its insureds." Id. at 34. In
28 the court's view, that would contradict "decades of cases consistently holding that an

1 insurer may be equitably subrogated to its insured's indemnification claims." Id.

2 While LSIC attempts to distinguish the Interstate case on grounds it does not
3 technically involve a breach of the covenant claim and instead examines only a
4 subrogation claim in the context of breach of contract, that perceived distinction makes
5 little difference. It is well established that a covenant of good faith and fair dealing is
6 implied by law into every contract. Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 349-50
7 (2000); San Jose v. Old Republic Life Ins. Co., 723 F.2d 700, 703 (9th Cir. 1984). In
8 addition to breach of contract, any insurer who unreasonably and without proper cause
9 refuses to provide a defense and/or benefits due under the policy is also subject to being
10 sued in tort for breach of the implied covenant of good faith and fair dealing. Emerald
11 Bay Comm. Assoc. v. Golden Eagle Ins. Corp., 130 Cal. App. 4th 1078, 1093 (2005).
12 Therefore, because breach of contract and breach of the implied covenant claims are
13 interrelated in the insurance context, the fact that Interstate involved breach of contract
14 only is of little moment. Consequently, in the Court's view, Interstate is a better indicator
15 of how the California Supreme Court will ultimately interpret this issue than the National
16 Union case advocated by LSIC.² Reconsideration as to the Court's denial of summary
17 judgment as to Plaintiff's breach of the implied covenant is therefore DENIED.

18 LSIC's second argument in favor of reconsideration fares no better. LSIC argues
19 that the Court committed clear error by refusing to grant summary judgment as to the
20 claim by FOF's real estate manager, FPI, that it qualified for coverage. The underlying
21 construction contract between Gala and FOF required that Gala indemnify and hold
22 harmless not only FOF but also its agents and employees (including FPI) from losses to
23 the extent caused by Gala or its subcontractor. Consequently, according to Plaintiff,

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25 ² It must also be noted that National Union relies heavily on another California Court of Appeal
26 case, Gulf Ins. Co. v. TIG Ins. Co., 86 Cal. App. 4th 422 (2001), in reaching its conclusion as to bad faith
27 liability. Significantly, this Court has already distinguished Gulf as having been decided in the context of a
28 surety relationship as opposed to a liability insurance obligation under which equitable subrogation is
sought. The Gulf decision expressly recognized that the surety's performance bond was not a liability
policy and, unlike the coverage in question here, was not even "intended to cover the type of damage"
done to the injured party." Id. at 427.

1 LSIC added FOF as an additionally named insured through endorsement. While Plaintiff
2 contends that this Court committed clear error by refusing to foreclose FPI's status as an
3 insured and by "conflating the concept of a named additional insured with the concept of
4 an additional named insured," (see Def.'s Mot., 5: 8-10) any confusion in that regard
5 rests with the LSIC policy itself.

6 As noted in the operative Memorandum and Order, the LSIC policy includes,
7 within the definition of an insured, "[a]ny person (other than your employee) or any
8 organization while acting as **your** real estate manager." ECF No. 35, 10:23-25 (citing
9 Def.'s Statement of Undisputed Fact ("DUF") No. 50). The LSIC policy defines the
10 terms "you" and "your" as referring to both "the named insured shown in the [LSIC] policy
11 declarations, and any other person or organization qualifying as a Named Insured under
12 the policy." DUF No. 49. If the LSIC policy had referred only to the named insured,
13 LSIC would have a good argument that FOF was not the insured named in the policy
14 declarations, and that consequently FOF's manager did not qualify as an additional
15 insured under the terms of the policy. The LSIC policy goes farther, however, in
16 according coverage not only to the insured named in the policy declarations, but also to
17 anyone else "qualifying as a named insured under the policy." *Id.* Since FOF has been
18 named as an insured by way of specific endorsement, it would appear FOF indeed
19 "qualifies" as a named insured under this definition. At a minimum, this raises a triable
20 issue of fact as to what the language of the LSIC policy means, since if LSIC had
21 intended to limit the meaning of "you" or "your" to the named insured only there would be
22 no reason to include the additional provision that the term also encompass "any other
23 person or organization qualifying as a named insured." To the extent the meaning of
24 LSIC's policy language is uncertain, it is axiomatic that any such ambiguity be strictly
25 resolved against the drafter, here LSIC. Helfand v. National Union Fire Ins. Co.,
26 10 Cal. App. 4th 869, 880 (1992). If anything, it is LSIC's own policy language that
27 conflates the concepts of named and additional insureds in this context.

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1 Significantly, too, case law relied upon by LSIC in support of its position that “you”
2 or “your” be limited to the named insured only did not involve the additional language
3 found in the LSIC policy. In Gornik v. Nationwide Property and Cas. Ins. Co., 2004 WL
4 2822157 (Cal. App. 2004), for example, which LSIC cites for the proposition that the
5 name of an additional insured cannot be substituted in place of word “you” or “your” in
6 such policy language, the policy language at issue was limited to the named insured only
7 and did not contain the additional language found in the LSIC policy extending those
8 terms to anyone else “qualifying” as a named insured under the policy. Id. at * 2

9 Given the above, the Court finds that LSIC’s second argument for reconsideration
10 is no more successful than its first, and fails to identify any clear error. LSIC’s Motion for
11 Reconsideration (ECF No. 36) is accordingly DENIED.³

12 IT IS SO ORDERED.

13 Dated: August 21, 2017

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15 MORRISON C. ENGLAND, JR.
16 UNITED STATES DISTRICT JUDGE
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27 _____
28 ³ Having determined that oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs in accordance with Local Rule 230(g).