

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

COLUMBIA CASUALTY COMPANY, an Illinois corporation,

Plaintiff,

v.

GORDON TRUCKING, INC., a Washington corporation, and DOES 1 through 10,

Defendants.

Case No.: 09-CV-05441-LHK

ORDER GRANTING GORDON TRUCKING INC.'S MOTION TO VOLUNTARILY DISMISS ITS CLAIMS AGAINST AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY

GORDON TRUCKING, INC., a Washington corporation, and DOES 1 through 10,

Counterclaimants,

v.

COLUMBIA CASUALTY COMPANY, an Illinois corporation; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, an Alaska corporation; GREAT WEST CASUALTY COMPANY, a Nebraska corporation; and DOES 1 through 10,

Counterdefendants.

On April 20, 2010, Defendant and Counterclaimant Gordon Trucking, Inc. ("Gordon Trucking") moved to dismiss its claims against American International Specialty Lines Insurance

1 Company ("American International"). Dkt. No. 44 ("Def.'s Mot."). Plaintiff, Counterdefendant,
2 and Crossdefendant Columbia Casualty Company ("Columbia Casualty") opposes the
3 unconditional dismissal of Gordon Trucking's claims against American International. Dkt. No. 62
4 ("P.'s Opp'n"). Pursuant to Civ. L.R. 7-1(b), the Court finds this matter appropriate for resolution
5 without oral argument. For the foregoing reasons, Gordon Trucking's motion to dismiss its claims
6 against American International is GRANTED.

7 I. BACKGROUND

8 This dispute arises out of the parties' disagreement concerning insurance obligations
9 resulting from a personal injury accident. *See* Dkt. No. 1-1, at 7-15. On May 3, 2007, Drew
10 Bianchi suffered serious injuries in an automobile accident involving, among others, a Gordon
11 Trucking tractor trailer and one of its drivers. Def.'s Mot. 3. Bianchi filed a civil lawsuit on or
12 about January 29, 2008 and named Gordon Trucking and the driver of its tractor trailer among the
13 defendants. *Id.* Gordon Trucking notified its insurers¹ of the accident and Bianchi's lawsuit
14 sometime in August of 2008. *See* Def.'s Mot. 4; P.'s Opp'n 2; Def.'s First Reply 4. This
15 notification also included a promise that Gordon Trucking's outside defense counsel would provide
16 a more detailed report, P.'s Opp'n 2; *see* Dkt. No. 1-1, Ex. A, at 1-2, but Columbia Casualty claims
17 that it never received such a report, P.'s Opp'n 3.

18 On August 14, 2008, Columbia Casualty responded to Gordon Trucking's communication
19 with a letter. Dkt. No. 1-1, Ex. B. In it, a representative of Columbia Casualty wrote:

20 [Columbia Casualty] has determined that the nature of the incident alleged by
21 [Bianchi] is unlikely to impact [Columbia Casualty's] excess policy limits should a
22 formal claim or suit be pursued and the matter will be designated "Record Only".

23 If you, your insurance broker and/or the underlying insurance carrier(s)
24 subsequently obtain any information which indicates that [Bianchi's] injuries may
25 impact [Columbia Casualty's] excess policy limits and/or if the underlying
insurance carrier(s) disclaims coverage for this claim or their limits of coverage
become eroded or exhausted, please so notify the undersigned immediately.

26 ¹ Gordon Trucking maintained auto liability insurance for the 2006-2007 policy year with several
27 insurance carriers. Def.'s Mot. 4. Its coverage was structured as follows: Great West Casualty
28 Company covered liability from \$500,000 to \$5 million; Columbia Casualty covered the next \$5
million in liability; American International the next \$20 million; and the Fireman's Fund covered
any further liability. *Id.*

1 *Id.* Columbia Casualty's representative claims that he designated the file "Record Only" because
2 the police report made it clear that a non-Gordon Trucking vehicle had caused the accident and that
3 Gordon Trucking's truck had not impacted Bianchi's vehicle. P.'s Opp'n 2. In any case, Columbia
4 Casualty did not make any further contact with Gordon Trucking or its other insurers. Def.'s Mot.
5 4.

6 To defend its interests against Bianchi's suit, Gordon Trucking selected trial counsel, with
7 Great West's approval, Def.'s First Reply 4, and retained additional counsel at American
8 International's request, *id.* at 4. A jury trial in Bianchi's matter began on August 10, 2009 and
9 ended on September 21, 2009 with a verdict for Bianchi in the amount of \$49,123,375.87. Def.'s
10 Mot. 4. Prior to this verdict, but after closing arguments, Bianchi and Gordon Trucking entered
11 into a "High/Low Agreement." *Id.*; Dkt. No. 64 ("Def.'s First Reply"), at 4. The Agreement
12 capped Gordon Trucking's exposure at a maximum of \$18,000,000 and guaranteed plaintiff a
13 damage payment of at least \$1,000,000. Def.'s Mot. 4; Def.'s First Reply 4. In addition, both
14 parties waived their appeal rights. Def.'s Mot. 4. Due to Gordon Trucking's liability for a
15 significant amount of both the economic and non-economic damages, the verdict would have
16 forced Gordon Trucking to pay damages in excess of \$31,000,000 without the High/Low
17 Agreement. Dkt. No. 59, at 3-4.

18 Gordon Trucking notified Columbia Casualty of the jury verdict, of the High/Low
19 Agreement, and of Gordon Trucking's liability on September 24, 2009. Def.'s First Reply 5. At
20 that time, Gordon Trucking informed Columbia Casualty that it bore responsibility for \$5 million
21 of the verdict. *Id.* Columbia Casualty represents that neither Gordon Trucking, Gordon Trucking's
22 defense counsel, American International nor American International's counsel informed Columbia
23 Casualty that a trial or settlement negotiations had commenced. P.'s Opp'n 3. At the time it finally
24 learned of the High/Low Agreement, Columbia Casualty denied liability based on its belief that
25 Gordon Trucking's actions constituted a breach of its insuring agreement with Columbia Casualty.
26 *Id.* It sued Gordon Trucking on November 10, 2009 seeking a declaration that it was not
27 responsible for paying any damages resulting from the Bianchi trial. *See* P.'s Opp'n 3; Def.'s Mot.
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1 5. Gordon Trucking subsequently removed the action to federal court, Dkt. No. 1, and filed
2 counterclaims against Columbia Casualty, American International, and Great West Casualty
3 Company, Dkt. Nos. 8, 9.

4 After commencing this litigation, Gordon Trucking claims to have reached a settlement
5 with American International. Dkt. No. 45 ("Hennessy Decl."), at ¶ 9. Under the terms of this
6 settlement, Gordon Trucking has agreed to dismiss its claims against American International with
7 prejudice and without costs to either party. *Id.* In return, Gordon Trucking will assign to American
8 International the right to pursue its claims against Columbia Casualty. *Id.* In addition, American
9 International will defend the claims that Columbia Casualty has alleged against Gordon Trucking.
10 *Id.* ¶ 10.

11 According to Gordon Trucking, dismissal of its claims against American International, with
12 prejudice and without costs to either party, will not prejudice Columbia Casualty. *Id.* ¶ 12.
13 Columbia Casualty opposes the dismissal "only as it involves certain equitable claims." P.'s Opp'n
14 2. It argues that American International should be judicially bound by admissions in its answer to
15 Gordon Trucking's counterclaim. *Id.*

16 II. LEGAL STANDARD

17 "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request
18 only by court order, on terms that the court considers proper." FED. R. CIV. P. 41(a)(2). "This rule
19 applies to a dismissal of any counterclaim, crossclaim, or third-party claim." FED. R. CIV. P. 41(c).
20 "The Ninth Circuit has long held that the decision to grant a voluntary dismissal under Rule
21 41(a)(2) is addressed to the sound discretion of the District Court" *Hamilton v. Firestone Tire*
22 *& Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). "The purpose of the rule is to permit a
23 plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced or
24 unfairly affected by dismissal." *Stevedoring Servs. of Am. v. Armilla Intern. B.V.*, 889 F.2d 919,
25 921 (9th Cir. 1989) (citations omitted).

26 "Pursuant to the rule, the Court must make three separate determinations: (1) whether to
27 allow dismissal; (2) whether the dismissal should be with or without prejudice; and (3) what terms
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1 and conditions, if any, should be imposed." *Williams v. Peralta Cmty Coll. Dist.*, 227 F.R.D. 538,
2 539 (N.D. Cal. 2005) (citing *Burnette v. Godshall*, 828 F.Supp. 1439, 1443 (N.D. Cal. 1993), *aff'd*
3 *sub nom. Burnette v. Lockheed Missiles & Space Co.*, 72 F.3d 766, 767 (9th Cir. 1995)).

4 III. ANALYSIS

5 A. Whether to Allow Dismissal

6 Several courts have held that a court is without discretion to deny a motion under Rule
7 41(a)(2) where the plaintiff seeks dismissal with prejudice. *See Smoot v. Fox*, 340 F.2d 301, 303
8 (6th Cir. 1964); *Shepard v. Egan*, 767 F. Supp. 1158, 1165 (D. Mass. 1990); *see also* 8 MOORE'S
9 FEDERAL PRACTICE § 41.40[3] (3d ed. 2010). Nevertheless, when the dismissal does not dispose of
10 the entire litigation, the court should consider the effect of dismissal on other parties to the
11 litigation. *See ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. 2006) (holding
12 that on a motion for voluntary dismissal, a third-party intervenor's interests should be considered);
13 *County of Santa Fe v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031, 1049 (10th Cir. 2002)
14 ("[T]here will be circumstances where granting a plaintiff's motion to dismiss with prejudice may
15 adversely affect the defendant or, more likely, other parties to the litigation. In such situations, a
16 blanket rule that the court must grant the plaintiff's motion would lead to injustice.").

17 Because the requested dismissal here does not dispose of the entire litigation, the Court will
18 consider not only the effect of dismissal on the remaining parties, but also the effects of whether
19 the dismissal is with or without prejudice. "When ruling on a motion to dismiss without prejudice,
20 the district court must determine whether the defendant will suffer some plain legal prejudice as a
21 result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996)
22 (citations omitted). "[L]egal prejudice is just that—prejudice to some legal interest, some legal
23 claim, some legal argument. Uncertainty because a dispute remains unresolved is not legal
24 prejudice." *Id.* at 97. "[I]n determining what will amount to legal prejudice, courts have examined
25 whether a dismissal without prejudice would result in the loss of a federal forum, or the right to a
26 jury trial, or a statute-of-limitations defense." *Id.* "Plain legal prejudice . . . does not result . . .
27 when plaintiff merely gains some tactical advantage." *Hamilton*, 679 F.2d at 145.

1 Gordon Trucking argues that an order of dismissal is "unquestionably warranted." Def.'s
2 Mot. 6. It represents that a dismissal of its claims against American International will not prejudice
3 Columbia Casualty because Columbia Casualty's claims against Gordon Trucking will remain
4 undisturbed. *Id.* Furthermore, Gordon Trucking argues that a denial of dismissal will unduly
5 prejudice it because it must continue to litigate claims, and pay for litigation, that it no longer
6 wants to pursue. *Id.*

7 Columbia Casualty argues that it will suffer legal prejudice because dismissal of Gordon
8 Trucking's claims would deny it the use of otherwise incontrovertible judicial admissions. P.'s
9 Opp'n 5. Columbia Casualty rightly points out that even if the Court dismisses Gordon Trucking's
10 claims against American International, American International's claims against Columbia Casualty
11 will remain. P.'s Opp'n 5. According to Columbia Casualty, Gordon Trucking's counterclaim
12 against American International and American International's answer contain judicial admissions
13 relevant to two of American International's claims against Columbia Casualty. *Id.* In paragraph 25
14 of its December 22, 2009 counterclaim, Gordon Trucking alleged the following:

15 [American International] represented to Gordon Trucking that it had either properly
16 coordinated the defense and resolution of the *Bianchi* Action with Gordon
17 Trucking's other insurers or that [American International] itself would pay damages
18 on behalf of Gordon Trucking in excess of \$5,000,000 up to the [American
19 International] Policy limit as a result of the *Bianchi* Action. On information and
20 belief, throughout the *Bianchi* Action, [American International] operated under the
assumption that it was the first layer excess insurer, excess only to Great West, and
made such representations to Gordon Trucking. Gordon Trucking reasonably relied
on [American International's] representations to its detriment.

21 P.'s Opp'n 3-4 (citing Dkt. No. 9, at 15). In its March 1, 2010 answer to Gordon Trucking's
22 counterclaim, which also included cross claims against Columbia Casualty, American International
23 included the following response to paragraph 25:

24 Answering paragraph 25, [American International] alleges that through the verdict
25 in the *Bianchi* action, it erroneously believed that it was the first layer excess
26 insurer, excess only to Great West. Except as so alleged [American International]
denies the allegations in paragraph 25.

1 P.'s Opp'n 4 (citing Dkt. No. 28, at 3). Columbia Casualty contends that the Court should consider
2 these as judicial admissions even if the Court dismisses Gordon Trucking's claims against
3 American International.

4 As an initial matter, it is not clear to the Court why dismissing Gordon Trucking's claims
5 against American International changes the character of any factual assertions that Gordon
6 Trucking and American International made in their counterclaim and answer, respectively. The
7 general principle is that "[j]udicial admissions are formal admissions in the pleadings which have
8 the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the
9 fact." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (quoting *In re*
10 *Fordson Eng'g Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)). While American International
11 points out that once "a pleading is amended or withdrawn, the superseded portion ceases to be a
12 conclusive judicial admission," *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (quoting
13 *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir. 1929)), it fails to
14 explain how this applies to dismissed pleadings. In *Huey*, the defendant made an admission in its
15 original answer to the plaintiff's complaint. The defendant later, however, amended its answer to
16 deny that admission. The court held that even though the defendant had amended its answer, the
17 admission in its original answer could still be used by the plaintiff to create an additional issue of
18 material fact on a motion for summary judgment. *Id.* In other words, it was the defendant's
19 amendment of its answer that changed the character of its original admission from incontrovertible
20 to disputable.

21 The situation at hand is different. Here, Gordon Trucking seeks to dismiss its complaint
22 against American International, not amend it. Although the word "withdrawn" read in isolation
23 would appear to cover this situation, the *Huey* court's subsequent use of the word "superseded"
24 makes this interpretation too broad. Presumably, a pleading is not superseded unless another
25 pleading takes its place. Thus, a pleading is withdrawn, as used by the *Huey* court, when a party
26 replaces it with another version. This interpretation accords with the court's statement in *American*
27 *Title* that "[f]actual assertions in pleadings . . . , unless amended, are considered judicial
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1 admissions." 861 F.2d at 226 (citations omitted) (emphasis added). It is also consistent with the
2 principle that "where . . . the amendment only adds allegations, deleting nothing stated in the prior
3 pleadings, admissions made in the prior pleadings continue to have conclusive effect." *White v.*
4 *ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 n.5 (5th Cir. 1983). Furthermore, at least one district
5 court used statements made by a party in unrelated pleadings as judicial admissions. *See e.g.*,
6 *Gradetech, Inc. v. Am. Employers Group*, 2006 WL 1806156, *3 (N.D. Cal. June 29, 2006)
7 (holding that statements made by the defendant in complaints filed against unrelated third-parties
8 constituted judicial admissions); *cf. Longstreet Delicatessen, Fine Wines & Speciality Coffees,*
9 *L.L.C. v. Jolly*, 2007 WL 2815022, *14 (E.D. Cal. Sept. 25, 2007) (holding that a stipulation of
10 facts entered into by the parties in separate litigation may be judicial admissions).

11 Nevertheless, it is not necessary for the Court to rule on this matter here. Even accepting as
12 true that Gordon Trucking's counterclaim and American International's answer contained judicial
13 admissions and that those admissions would become inconclusive once Gordon Trucking's claims
14 against American International were dismissed, the Court does not find that Columbia Casualty
15 would suffer legal prejudice as a result of dismissal. First, it is not clear why Gordon Trucking's
16 allegations in paragraph 25 of its counterclaim should be binding as to American International.
17 Although American International did allege in its answer that it erroneously believed through the
18 verdict in the *Bianchi* action that it was the first layer excess insurer, excess only to Great West, it
19 otherwise denied Gordon Trucking's paragraph 25 allegations. *See* Def.'s First Reply 9.

20 Second, it is still possible, even if they are not judicial admissions, that Columbia Casualty
21 may be able to use the allegations in Gordon Trucking's counterclaim and American International's
22 answer as some evidence of the facts stated. As stated by the court in *Huey*, a withdrawn pleading
23 "still remains as a statement once seriously made by an authorized agent, and as such it is
24 competent evidence of the facts stated, though controvertible." 82 F.3d at 333 (quoting *Kunzlig*
25 *Jarnvagsstyrelsen*, 32 F.2d at 198). Moreover, American International does not appear to dispute
26 the truth of what it stated in its answer. In its reply brief for this motion, it reiterated that it
27 "erroneously thought that its policy was immediately excess of the Great West \$5 million primary
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1 policy, and although Gordon Trucking had put Columbia on notice of the Bianchi claim in August
2 2008, it too failed to recall that Columbia was one of its insurers." Def.'s First Reply 5. Such
3 "statements of fact contained in a brief *may* be considered admissions of the party in the discretion
4 of the district court." *American Title*, 861 F.2d at 227.

5 Third, voluntary dismissal would not affect the claims between either American
6 International and Columbia Casualty or between Gordon Trucking and Columbia Casualty. Dkt.
7 No. 65, at 2. Accordingly, Columbia Casualty can still use traditional discovery methods to seek
8 admissions regarding the facts alleged in paragraph 25 of Gordon Trucking's counterclaim and in
9 American International's response. Def.'s First Reply 11. As of the parties' briefing on this motion,
10 Columbia Casualty had not yet served written discovery or taken depositions. Def.'s Mot. 6.

11 Because Columbia Casualty will not suffer legal prejudice, the Court finds that Gordon
12 Trucking's claims against American International should be dismissed.

13 **B. Whether the Dismissal Should Be With or Without Prejudice**

14 In determining whether dismissal should be with or without prejudice, courts consider the
15 following: "(1) the defendant's effort and expense involved in preparing for trial, (2) excessive
16 delay and lack of diligence on the part of the plaintiff in prosecuting the action, and (3) insufficient
17 explanation of the need to take a dismissal." *Burnette*, 828 F. Supp. at 1443-44 (quoting *Paulucci*
18 *v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987)) (alterations and quotation marks omitted).

19 The first factor is relevant because dismissing without prejudice after the defendant has
20 already expended substantial resources in preparation for trial would be unfair. The plaintiff could
21 use what he learned during the litigation, file his claim again, and force the defendant back into
22 litigation. Here, not only is the litigation at a very preliminary stage, Def.'s Mot. 6, but Gordon
23 Trucking wants its claims against American International dismissed with prejudice. By dismissing
24 Gordon Trucking's claims against American International with prejudice, the Court permanently
25 streamlines the case at an early stage, reduces future burdens on the Court related to this litigation,
26 and eliminates American International's need to defend itself against Gordon Trucking's claims.
27 Furthermore, Gordon Trucking offers a more than sufficient explanation for seeking dismissal with
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1 prejudice. Gordon Trucking and American International have settled their dispute. Def.'s Mot. 2.
2 Public policy favors the settlement of claims. Dismissing with prejudice will give both parties the
3 full benefit of their bargain and ensure that neither is forced to unnecessarily spend resources on
4 litigation. These factors, therefore, favor dismissal with prejudice.

5 **C. What Terms and Conditions Should Be Imposed**

6 As the Ninth Circuit emphasized, "Rule 41 vests the district court with discretion to dismiss
7 an action at the plaintiff's instance 'upon such terms and conditions as the court deems proper.'"
8 *Hargis v. Foster*, 312 F.3d 404, 412 (9th Cir. 2002). Often, the condition sought involves payment
9 of litigation costs. *See e.g., Westlands Water*, 100 F.3d at 97-98; *see generally* 8 MOORE'S
10 FEDERAL PRACTICE § 41.40[10][d][i] (3d ed. 2010). Unlike most opponents to a motion for
11 voluntary dismissal, Columbia Casualty does not seek any payment. Rather, Columbia Casualty
12 seeks to condition the dismissal of Gordon Trucking's claims against American International on a
13 ruling that American International be bound by specific facts contained in Gordon Trucking's
14 counterclaim and American International's answer. As stated *supra* Part III.A, Columbia Casualty
15 will not suffer any legal prejudice regardless of the Court's ruling on this matter. Moreover,
16 Columbia Casualty has not explained why it needs a ruling on this now. For these reasons, the
17 Court does not deem such a condition proper. This ruling does not, however, preclude any party
18 from raising this issue at a later time.

19 **IV. CONCLUSION**

20 For the foregoing reasons, Gordon Trucking's motion is GRANTED. Pursuant to FED. R.
21 CIV. P. 41(a)(2), Gordon Trucking's counterclaims against American International are DISMISSED
22 with prejudice and without condition.

23 **IT IS SO ORDERED.**

24
25 Dated: November 4, 2010

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27 _____
28 LUCY H. KOH
United States District Judge