UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALLIANCE OF NONPROFITS FOR INSURANCE, RISK RETENTION GROUP,

Plaintiff,

v.

BRETT J. BARRATT, et al.,

Defendants.

2:10-CV-1749 JCM (RJJ)

ORDER

Presently before the court is defendants Brett J. Barratt, Commissioner of Insurance of the State of Nevada (hereinafter "commissioner"), the Department of Business and Industry Division of Insurance, and the State of Nevada's motion for reconsideration. (Doc. #44). Plaintiff Alliance of Nonprofits for Insurance, Risk Retention Group (hereinafter "Alliance") filed a non-opposition to the motion. (Doc. #45).

On March 21, 2011, plaintiff filed a motion for leave to file a supplement to its reply in support of its summary judgment motion. (Doc. #41). Since the motion was labeled "motion for leave," the motion was ripe on March 21, 2011, as evidenced by the docket (doc. #41). In an effort to manage its docket and to promote judicial efficiency, the court addressed the motion (doc. #41) on the day it became ripe. However, after the court ruled on the motion, but prior to the order being docketed by the clerk, defendants filed an opposition to the motion (doc. #42).

Subsequently, the court's order granting the plaintiff's motion was filed by the clerk. (Doc.

James C. Mahan
U.S. District Judge

#43). Since the order made no mention of the defendants' opposition (doc. #42), yet was docketed *after* the opposition was filed, defendants filed the present motion for reconsideration (doc. #44).

Motion For Reconsideration

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see* Fed. R. Civ. P. 59(e); *see also* Fed. R. Civ. P. 60(b).

In the defendants' motion for reconsideration (doc. #44), they assert that the court should reconsider granting the plaintiff's request to file a supplement, because it did not consider the defendants' opposition (doc. #42) before ruling on the motion. Plaintiff filed a non-opposition (doc. #45), and stated that it did not oppose the reconsideration if it were able to file a reply in support of its motion to file a supplement.

The court has not been presented with any newly discovered evidence or controlling law, and did not commit clear error, as it ruled on the motion upon it becoming ripe. *Id.* However, as it is always the court's goal to be fully informed on any issue, the court will allow the filing of the reply and will consider all of the submitted pleadings in making its ruling.

Motion To File Supplement

As previously stated in the original order (doc. #43), the plaintiff's complaint (doc. #1) stems from a cease and desist order issued by the commissioner, that ordered plaintiff to stop writing first dollar automobile liability insurance in Nevada. The cease and desist order stated that Alliance "is not an authorized insurer as defined by NRS 679A.030 since it does not hold a certificate of authority as a foreign domiciled [risk retention group]" and "...cannot participate in the [Nevada Insurance Guaranty Association]."

Plaintiff argues that the commissioner's interpretation and application of Nevada law as set forth in the cease and desist order violates the Liability Retention Act of 1986, 15 U.S.C. § § 3901-3906, "in that it impermissibly discriminates against foreign [r]isk [r]etention [g]roups." Plaintiff asserts that the commissioner violated the law in concluding that in order to first write dollar liability

insurance, the insurer must have a certificate of authority and be a member of the Nevada Insurance Guaranty Association, when in fact risk retention groups are *excluded* from joining and/or contributing to state insurance guaranty associations like the Nevada Insurance Guaranty Association.

Plaintiff argues that despite the plain language of the cease and desist order, defendants assert in their motion for summary judgment that risk retention groups "do not need to be members of [Nevada Insurance Guaranty Association] in order to obtain a certificate of authority and thereby write first dollar motor vehicle liability coverage."

In the present motion for leave to file a supplement (doc. #41), plaintiff asks this court to grant it leave to file an article (doc. #41- Exhibit A) written by the commissioner, where he states the reasons why foreign risk retention groups cannot write first dollar automobile insurance in Nevada. Plaintiff asserts that this article relates to this case because it "unambiguously demonstrate[s] the ...clear position that foreign [risk retention groups] cannot write first dollar automobile liability insurance in Nevada because they cannot join [Nevada Insurance Guaranty Association]." Further, plaintiff asserts that it had no opportunity to include the article as an exhibit to its reply, because it was not published until seven days after the reply deadline passed.

Under Federal Rule of Civil Procedure 15(d), a party may supplement a prior pleading with "any transaction, occurrence, or event that *happened after* the date of the pleading." (Emphasis added). Here, plaintiff filed its reply brief on March 11, 2011. (Doc. #40). Subsequently, on March 18, 2011, *after* the filing of the pleading, plaintiff became aware of the commissioner's article published in the Insurance Journal (doc. #41- Exhibit A).

In defendants' opposition (doc. #42), they assert that the article is "irrelevant as to any of the issues before the [c]ourt," and is therefore inadmissible. Alternatively, defendants assert that in the event the court is inclined to allow plaintiff to file the article, it submitted Exhibit A, the affidavit of the commissioner, to "unequivocally rebut any inferences asserted by the [p]laintiff," and to "clarify any ambiguities." (Doc. #42).

In the affidavit (doc. #42 Exhibit A), the commissioner asserts that his "[o]rders and various

statements...have been misinterpreted." Further, he reasserts defendants' position in the case and states that "nothing in [his] [o]rders should be interpreted as prohibiting a Risk Retention Group from qualifying as an 'authorized user'...if it has obtained a certificate of authority in Nevada as set forth in NRS 695 E and NRS Chapter 694C." *Id.* More specifically, he asserts that "nothing in [his] orders should be interpreted as precluding [Alliance] from writing first dollar motor vehicle liability coverage due to the fact that it is not a 'member insurer' of the Nevada Insurance Guaranty Association." *Id.*

Further, defendants assert in their opposition (doc. #42) that since the article purports to quote statements made by the commissioner, it is hearsay and inadmissible. *See Larex v. City of Los Angeles,* 946 F.2d 630 (9th Cir. 1991); *See also American Civil Liberties Union of Nevada v. City of Las Vegas,* 13 F. Supp. 2d 1064, 1070 (1998). Defendants proceed to assert that the article is irrelevant, and then argue that plaintiff should have pursued a judicial review of the cease and desist order, and that *Nat'l Warranty Ins. Co. RRG v. Greenfield,* 214 F.3d 1073, 1077 (9th Cir. 2000) is distinguishable. (Doc. #42). However, the court does not find these arguments relevant to the issue of whether the article may be submitted to the court to support plaintiff's position.

In the plaintiff's reply in support of its motion (doc. #46), it rebuts the defendants' legal arguments about the *Nat'l Warranty* case, and provides support for its position that the interpretation and application of the laws by the commissioner was discriminatory. Further, plaintiff asserts that the defendants are attempting to file a sur-reply when they addressed *Nat'l Warranty* in their opposition (doc. #42), as that was beyond the scope of the motion (doc. #41). This court agrees with the plaintiff that these arguments serve no other purpose than "to provide [d]efendants with an additional opportunity to argue their opposition" and do not address the motion to file the article (doc. #41).

Additionally, plaintiff asserts that the commissioner's affidavit should be stricken, as defendants did not seek leave to file the supplement, and its contents address the cease and desist order that occurred *prior* to the date of the initial pleading. *Id.* The court acknowledges that defendants did not seek leave, but recognizes that the affidavit does address the alleged

"misinterpretations" of his statements, i.e. the statements in the article. As the article is the topic of the motion to file the supplement (doc. #41), the affidavit is permitted to support the defendants' opposition.

Upon the court's review of the article (doc. #41 Exhibit A), it appears that it is an article written regarding the present case, and quotes the commissioner as saying "[f]oreign [Risk Retention Groups] don't have certificate of authority; they have a certificate of registration," and that his department "didn't provide a list of those that have a certificate of registration — only certificates of authority." Further, the article states that the department "then asked [Risk Retention Groups] like [Alliance] writing first dollar coverage to cease."

The court does not find that these statements are irrelevant to the issue at hand, as they are directly related to the issues in the motions for summary judgment (doc. #21 and #22). As the defendants have submitted the affidavit of the commissioner (doc. #42 Exhibit A) to support their position that the statements are misinterpreted, the admission of the article is not unfairly prejudicial to the defendants. Further, as the article is not being offered to prove the truth of the matters asserted, it is not hearsay. Federal Rule of Evidence 801. Any issue regarding the article goes more to its weight than its admissibility.

In light of the fact that the article was not published until after the reply was submitted, and upon determination of the relevance and non-prejudicial nature of the article, this court is inclined to grant the plaintiff leave to file the article as an exhibit to its reply.

Accordingly,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants' motion for reconsideration (doc. #44) be, and the same hereby is, GRANTED.

. . .

. . .

. . .

. . .

. . .

IT IS FURTHER ORDERED that plaintiff Alliance of Nonprofits for Insurance, Risk Retention Group's motion for leave to file a supplement to its reply (doc. #41), be and the same hereby is, GRANTED.

DATED April 18, 2011.

UNITED STATES DISTRICT JUDGE