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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HALLMARK INSURANCE
COMPANY OF TEXAS,
a foreign corporation,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
CV 09-976-AA

Plaintiff,

vs.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, a foreign
corporation; and JRP DRYWALL
ENTERPRISES, INC., an Oregon
corporation,

Defendants.

AIKEN, Chief Judge:

Plaintiff American Hallmark Insurance Company of Texas brought this insurance coverage action against American Family Mutual Insurance Company and JRP Drywall Enterprises, Inc. ("JRP"). On December 9, 2010, a bifurcated court trial was held concerning the terms of a mediated agreement and whether that

1 agreement between plaintiff and defendant was enforceable. This
2 court previously found that plaintiff and defendant concluded an
3 agreement reached at a mediation held on July 14, 2009. The
4 court found, however, that genuine issues of material fact
5 existed as to the material terms of the agreement. After
6 considering the evidence, including witness testimony and
7 exhibits, and the briefing by parties, the court enters the
8 following Findings of Fact and Conclusions of Law:

9 Findings of Fact

10 1. Plaintiff is a property and casualty insurance company
11 domiciled in the State of Texas and authorized to do business in
12 the State of Oregon, with its principal place of business in
13 Texas.

14 2. Defendant is a property and casualty insurance company
15 domiciled in the State of Wisconsin and authorized to do business
16 in the State of Oregon, with its principal place of business in
17 Madison, Wisconsin.

18 3. Defendant JRP is a construction company that is
19 domiciled, has its principal place of business, and is authorized
20 to do business in the State of Oregon.

21 4. William Popoff was a general contractor and a named
22 insured of plaintiff's under a commercial general liability
23 insurance policy, policy number 44-CL-435288-02/000.

24 5. JRP was a named insured of defendant's under a commercial
25 general liability insurance policy, policy number 36X0-7385-03.

26 6. Popoff hired JRP as a subcontractor on a construction job
27 and JRP's employee Gerardo Herrera was injured on that job site.

28 7. Herrera sued Popoff, and plaintiff and defendant jointly

1 defended Popoff. Defendant was defending Popoff on the basis
2 that Popoff was an additional insured through JRP's policy with
3 defendant.

4 8. Plaintiff and defendant disagreed about defendant's
5 indemnity obligation in the Herrera lawsuit.

6 9. On July 14, 2009, a global mediation was held. Defendant
7 and plaintiff each had a representative who was an attorney
8 present at the mediation. Each representative acted as an agent
9 of their respective insurers, with apparent authority to act on
10 their principals' behalf.

11 10. At the mediation, Herrera's counsel agreed to accept
12 \$900,000 to settle the lawsuit if plaintiff and defendant could
13 obtain this amount of authority.

14 11. At the mediation, defendant's representative, Eric Tait,
15 stated to plaintiff that if plaintiff paid the \$900,000 to settle
16 the Herrera lawsuit, defendant would agree that the dollar amount
17 of the settlement was reasonable and agree to limit the defenses
18 defendant could raise in a subsequent coverage lawsuit by
19 plaintiff. Defendant stated that it would limit its defenses to
20 the specific defenses it had identified in its reservation of
21 rights letters to Popoff. Those defenses were that ORS 30.140
22 and the employer's liability exclusion of defendant's policy
23 precluded any indemnity obligation to Popoff. Defendant stated
24 that it would also reserve the right to raise the negligence of
25 Herrera and Popoff as defenses. Finally, under defendant's
26 proposal, defendant and plaintiff preserved their disagreement
27 concerning which of the policies would be primary versus excess
28 for the indemnity obligation attributable to JRP's fault.

1 12. Plaintiff stated that it accepted defendant's offer but
2 that plaintiff would need defendant to reiterate the terms of the
3 agreement in a writing. Later in the day on July 14, 2009,
4 defendant's representative, Eric Tait, sent a email reiterating
5 and containing the terms of the agreement between defendant and
6 plaintiff.

7 13. The mediator, John Barker, testified as a witness in
8 this trial, and stated that he was present for the discussion
9 between plaintiff and defendant. Mr. Barker testified that in
10 his opinion, the parties had reached an agreement. The court
11 finds Mr. Barker's testimony credible.

12 14. On or around July 17, 2009, plaintiff agreed to fund the
13 \$900,000 settlement with Herrera. The settlement agreement was
14 fully executed on July 31, 2009. Under the settlement agreement
15 Popoff assigned his rights arising out of the Herrera lawsuit to
16 plaintiff and Herrera and Popoff released plaintiff from any
17 liability arising out of Herrera's accident and/or lawsuit.
18 Defendant was not a signatory to the settlement agreement and was
19 not released by the underlying parties.

20 15. On August 19, 2009, plaintiff filed an insurance
21 coverage lawsuit against defendant and JRP.

22 16. After the July 14, 2009 mediation, witness Eric Tait
23 confirmed that defendant had no contact with anyone involved in
24 the Herrera lawsuit, including the defense counsel defendant
25 retained along with plaintiff, until after plaintiff's coverage
26 lawsuit was filed.

27 17. In the coverage lawsuit defendant raised the affirmative
28 defense that defendant and plaintiff had either not formed an

1 agreement or that plaintiff had so breached that agreement so as
2 to excuse defendant's performance. Defendant argued that there
3 were additional terms that were part of the agreement. These
4 additional terms were that Popoff was prohibited from assigning
5 his rights arising out of the lawsuit to plaintiff, that
6 plaintiff could only sue defendant in its coverage lawsuit and
7 that defendant would be released in the Herrera settlement.
8 Defendant also argued that the agreement with plaintiff was not
9 valid because it had not been reduced to a formally executed
10 signed writing. Witness Tait confirmed that these additional
11 terms did not appear in the July 14, 2009 email defendant sent
12 to plaintiff and that defendant did not discuss these additional
13 terms with anyone involved in the Herrera lawsuit until after
14 plaintiff's coverage lawsuit was filed.

15 Conclusions of Law

16 1. The court has jurisdiction over this matter pursuant to
17 diversity jurisdiction. 28 U.S.C. § 1332.

18 2. To form a contract parties must agree to certain terms
19 and manifest their assent. R.J. Taggart, Inc. v. Douglas County,
20 31 Or. App. 1137, 1140, 572 P.2d 1050 (1977). The parties need
21 only agree on the essential or material elements of the contract,
22 not on every possible term. Pacificorp v. Lakeview Power Co.,
23 131 Or. App. 301, 307, 884 P.2d 897 (1994) (internal citation
24 omitted).

25 3. Oregon relies on the objective theory of contract. Real
26 Estate Loan Fund of Or. v. Hevner, 76 Or. App. 349, 354, 709 P.2d
27 727 (1985). Under this theory, undisclosed intent or ideas are
28 not relevant to the determination of whether a contract exists or

1 what terms are part of the contract. Id. Acts and words have
2 the meaning which a reasonable person would ascribe to them in
3 view of the surrounding circumstances in which they are
4 undertaken or spoken. Kitzke v Turnidge, 209 Or. 563, 573, 307
5 P.2d 522 (1957); see also, Groshong v. Mut. of Enumclaw Ins. Co.,
6 329 Or. 303, 308, 985 P.2d 1284 (1999).

7 4. The mediation and email on July 14, 2009, resulted in a
8 legally binding agreement with an offer and acceptance under the
9 objective theory of contract. Defendant offered to agree, if
10 plaintiff agreed to pay \$900,000 to settle the Herrera case, that
11 defendant would not contest the reasonableness of the amount of
12 the settlement. Plaintiff said it accepted this offer and wanted
13 the terms reflected in writing. Defendant then sent an email
14 reiterating the agreement reached at the mediation. A fully
15 binding agreement resulted from this offer and acceptance and
16 partial performance. Plaintiff fulfilled its required
17 performance by paying \$900,000 to Herrera and settling his
18 lawsuit.

19 5. Under the objective theory of contract, only the terms
20 the parties agreed upon and that were reiterated in defendant's
21 July 14, 2009 email are part of the contract. Thus, the terms of
22 the contract were that if plaintiff paid the \$900,000 to settle
23 the Herrera lawsuit, defendant would agree that the amount of the
24 settlement was reasonable and would limit its defenses to certain
25 defenses specifically set out in its prior reservation of rights
26 letters or agreed to by the parties at the mediation, and
27 reiterated in defendant's July 14, 2009, email. Those defenses
28 were ORS 30.140, the defendant's policy's employer's liability

1 exclusion, the negligence of Herrera and Popoff and the proper
2 construction of the two parties "other insurance clauses" with
3 regard to which policy was primary and which was excess for the
4 percentage of the Herrera loss attributable to JRP's fault.

5 6. Defendant failed to preserve the defense that Popoff was
6 not an additional insured, or any other defenses that may have
7 existed under the terms and conditions of defendant's policy but
8 which were not expressly preserved under the parties agreement.

9 7. The other terms defendant believes were part of the
10 agreement reached with plaintiff were never communicated to or
11 discussed with plaintiff and therefore not part of the agreement.
12 The court does not find Tait's testimony credible in this regard.
13 These purported terms were that Popoff was prohibited from
14 assigning his rights arising out of the lawsuit to plaintiff,
15 that plaintiff could only sue defendant in its coverage lawsuit
16 and that defendant would be released in the Herrera settlement.

17 8. Upon plaintiff's completion of the Herrera settlement,
18 defendant was bound to limit its defenses as agreed to in the
19 parties agreement. As a result, the only defenses defendant may
20 raise in this lawsuit are ORS 30.140, the employer's liability
21 exclusion of the defendant's policy, the negligence of Herrera
22 and Popoff and the proper construction of the two parties "other
23 insurance clauses" with regard to which policy was primary and
24 which was excess for the percentage of the Herrera loss
25 attributable to JRP's fault.

26 9. Accordingly, defendant is barred from raising any defense
27 not preserved under the parties agreement, including, but not
28 limited to, the defense that Popoff was not an additional

1 insured. Consistent with this ruling, plaintiff may renew its
2 summary judgment motion on the legal defenses preserved under the
3 parties agreement.

4 10. Finally, both parties are to bear their own attorney
5 fees in this action.

6 IT IS SO ORDERED.

7 Dated this 17th day of December 2010.
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12 Ann Aiken
13 United States District Judge
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