

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

UNITED FINANCIAL CASUALTY COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 5:10-cv-00118

JOSHUA NEWSOM, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The Court has reviewed Defendant Newsom's Motion to Dismiss, or, Alternatively, Motion to Transfer Venue to the Eastern District of Texas, Beaumont Division [Docket 6], filed April 12, 2010; Newsom's Motion for Expedited Hearing, or, in the Alternative, Motion for Expedited Decision [Docket 10], filed April 15, 2010; Defendants FAC Trucking Company, Frances Cline and Michael Cline's Motion to Dismiss [Docket 34], filed June 28, 2010; and Newsom's Amended Motion to Dismiss, or, Alternatively, to Transfer Venue and Alternative Motion to Stay [Docket 47], filed September 24, 2010.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Financial Casualty Company (United Financial) is an Ohio Corporation with its principal place of business in Mayfield Village, Ohio. (Docket 1 at ¶ 2). Defendant Joshua Newsom (Newsom) is a resident of Romayor, Liberty County, Texas. (Docket 1 at ¶ 3). Defendant

FAC Trucking Company (FAC Trucking) is a West Virginia Corporation with its principal place of business in Gilbert, Mingo County, West Virginia. (Docket 1 at ¶ 4). Defendants Edward Cline, Woodrow Cline, W.E. Trucking, Edward Cline, Jr., Frances Cline and Michael Cline are residents of Hanover, Wyoming County, West Virginia. (Docket 1 at ¶¶ 5-10).

On March 16, 2009, Newsom filed an original petition in the District Court of Liberty County, Texas, seeking damages for alleged work-related injuries against FAC Trucking, Edward Cline and Woodrow Cline. (Docket 1 at ¶ 13). The following facts are set forth in his first amended petition, which was filed on March 16, 2010. The amended petition alleges that following Hurricane Ike, which hit the gulf coast of the United States and caused damage in Liberty County, Texas, in 2008, Liberty County entered into an agreement for the cleanup of certain public property with one or more of the following parties: DTS [Daniel's Tree Service], Daniel McClaran, FAC Trucking, Edward Cline and Woodrow Cline. (Docket 6-1 at 3-4). Newsom claims that these parties worked together with the common purpose of conducting the cleanup work. (Docket 6-1 at 4).

Newsom was an employee of FAC Trucking on or about October 18, 2008, when he sustained injuries while working in the course and scope of his employment. (Docket 1 at ¶14). Specifically, Newsom alleges that on that date he was asked to load tools and equipment into a toolbox that was located behind the cab of a truck. (Docket 6-1 at 4). While on the truck bed loading the tools, he alleges that one or more of the defendants (in his petition) was operating the truck, causing it to shake back and forth. Newsom lost his balance and fell. (Docket 6-1 at 5). At that time, Edward Cline lowered a grappling crane onto the truck bed, crushing his fingers. (Docket

6-1 at 5; Docket 1 at ¶¶ 15-19). Newsom's fingers were amputated three days later. (Docket 6-1 at 5).

Newsom claims that his worker's compensation benefits claim was denied because FAC Trucking failed to obtain worker's compensation insurance for its Texas operations. (Docket 6-1 at 5). In his amended petition, Newsom brings negligence claims against DTS, McClaran, FAC Trucking, and Edward Cline; and negligent entrustment, joint enterprise, vicarious liability and negligent hiring claims against DTS, McClaran, FAC Trucking, Edward Cline and Woodrow Cline.

The truck described by Newsom in his petition was owned by Woodrow Cline, Newsom's co-worker, and/or W.E. Trucking, and insured by United Financial at the time of the incident. (Docket 1 at ¶¶ 21-23). There were two United Financial insurance policies in effect at that time. The named insureds on United Financial policy 06610631-0 (Policy 1) were Woodrow Cline and W.E. Trucking, and the "rated drivers" on Policy 1 were Woodrow Cline, Edward Cline, and Edward Cline, Jr. (Docket 1 at ¶ 23). The named insureds on United Financial policy 06611372-0 (Policy 2) were Frances Cline, Michael Cline, and FAC Trucking, and the "rated drivers" on Policy 2 were Frances Cline, Michael Cline and Teddy Catlett. (Docket 1 at ¶ 24).

United Financial initiated this case upon filing its Complaint for Declaratory Judgment [Docket 1] on February 4, 2010. It cites several policy provisions and exclusions in support of its position that it is not responsible for coverage for Newsom's injury. Specifically, it states that it is not liable for coverage for the following reasons: the vehicle involved in the incident was not an "insured auto" under Policy 1; the policies exclude coverage when FAC Trucking Company might be held liable under worker's compensation laws; the policies exclude coverage when Newsom was an employee of FAC Trucking, Edward Cline and Woodrow Cline or a fellow employee of Edward

Cline and Woodrow Cline; and the vehicle involved in the accident was not an “auto” but rather “mobile equipment” as defined in the policies. (Docket 1 at 5-9). United Financial requests that this Court “(1) declare and adjudge that no liability coverage is available under United Financial Casualty Company policies 06610631-0 and 06611372-0, United Financial Casualty Company has no duty to indemnify FAC Trucking Company, Edward Cline, Woodrow Cline, W E Trucking, Edward Cline, Jr., Frances Cline and Michael Cline against the allegations set forth in Newsom’s Petition; (2) award United Financial Casualty Company its costs and fees expended herein; and (3) grant such other relief as the Court deems appropriate.” (Docket 1 at 10).

On July 8, 2010, Colony Insurance Company, with whom DTS is insured, instituted a declaratory judgment action in the Eastern District of Texas against DTS and Daniel McClaran seeking a declaration that it does not owe a duty to DTS to indemnify it against the claims asserted in Newsom’s underlying lawsuit. (Docket 47-2 at 8). DTS filed a counterclaim and joinder of parties on August 9, 2010, joining FAC Trucking and United Financial, among other parties, seeking in part a declaration that Newsom’s claims against DTS are covered by United Financial’s policy with FAC Trucking and that United Financial has a duty to indemnify it against those claims. (Docket 47-4 at ¶ 30).

II. MOTIONS PENDING

On April 12, 2010, Newsom filed his motion to dismiss this action or transfer venue, asserting in his supporting memorandum that this declaratory action should be dismissed for the following reasons: Texas has the strongest interest in applying Texas law to this matter; handling

the common issues in a single matter will promote efficiency and prevent unnecessary entanglement between federal and state court systems; and United Financial is using this action as a device for procedural fencing. (Docket 7 at 2). Newsom asserts that, alternatively, the Court should dismiss the case or transfer venue because this Court lacks personal jurisdiction over him and the proper venue for this case is the Eastern District of Texas, Beaumont Division. (Docket 7 at 2-3). On April 15, 2010, Newsom moved to expedite the decision on his motion. On September 24, 2010, he filed his amended motion or motion to stay noting the recent declaratory action in which DTS joined United Financial. He states that the new declaratory action pending in the Eastern District of Texas features the same coverage issues as this action and that, therefore, this action should be dismissed or transferred and consolidated or, in the alternative, stayed pending the outcome of the related litigation. (Docket 47 at 1-2).

United Financial responded on May 4, 2010, contending that this case should not be dismissed because this action will settle the legal relations at issue and will terminate United Financial's uncertainty as to the coverage issues giving rise to its action. (Docket 13 at 3). United Financial further contends that venue is proper because the policies were issued in West Virginia and the named insureds are West Virginia residents. (Docket 13 at 6). On October 8, 2010, United Financial responded to Newsom's amended motion, contending that the parties in the instant case and the other declaratory action pending in the Eastern District of Texas are not identical and therefore the pending actions in Texas provide no basis for dismissal of this action. (Docket 49 at 3). United Financial further states in its response that transfer of this action is inappropriate inasmuch as there is no guarantee that the federal court in Texas would consolidate the cases and

that a stay is inappropriate because the pending state court action does not involve the same parties and same issues. (Docket 49 at 8-9). Newsom replied on May 11, 2010.

On June 14, 2010, FAC Trucking, Frances Cline and Michael Cline filed their motion to dismiss on the grounds that no case or controversy exists between themselves and United Financial inasmuch as they have not sought a defense or indemnification for Newsom's civil action. (Docket 32 at 3). United Financial responded on June 28, 2010, contending that a controversy exists because Newsom filed a tort claim against FAC Trucking, and United Financial, as an insurer of FAC Trucking, Frances Cline and Michael Cline, seeks adjudication on the extent of its responsibility for Newsom's claims. (Docket 34 at 2).

III. GOVERNING STANDARD

Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, district courts are authorized to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.* However, district courts have discretion in deciding whether or not to make such a declaration of rights. *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 421 (1998). "[T]his discretion should be liberally exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity . . . but it should not be exercised for the purpose of trying issues involved in cases already pending, especially where they can be tried with equal facility in such cases." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1937).

Our Court of Appeals has held that a court should hear a declaratory judgment action when the relief sought “‘(1) will serve a useful purpose in clarifying and settling the legal relations in issue,’ and (2) ‘will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.’” *Ind-Com Elec. Co.*, 139 F.3d at 423 (citing *Quarles*, 92 F.2d at 325). The Court must also weigh concerns of federalism, efficiency and comity when determining whether to exercise its discretion. *Id.* (citing *Mitcheson v. Harris*, 955 F.2d 235, 237-40 (4th Cir. 1992)).

As a preliminary hurdle to the exercise of declaratory judgment, three requirements must be met: (1) the complaint must allege an ‘actual controversy’ between the parties; (2) the court must possess an independent basis for jurisdiction over the parties; and (3) the court must not abuse its discretion in exercising jurisdiction. *Volvo Const. Equip. North Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 592 (4th Cir. 2004).

IV. DISCUSSION

A. Independent Basis for Jurisdiction

The Court first turns to Newsom’s claim that the Court lacks personal jurisdiction over him. In support of this assertion, he states that he has no significant contacts with West Virginia, it is unfair to require him to bear the costs and burden of litigating this action outside of his home state and that venue is proper in the Eastern District of Texas because that is where the events giving rise to United Financial’s claim took place.

United Financial responds to Newsom's assertions with a venue argument. It states that venue is proper here under 28 U.S.C. § 1391 because a "substantial part of the property that is the subject of the action is situated" in West Virginia. (Docket 13 at 6). Specifically, the "property" to which it refers are the insurance policies between it and the defendants. (Docket 13 at 6). United Financial requests that if the Court finds there is no personal jurisdiction over Newsom, then the case proceed against the named insureds. (Docket 13 at 6).

To demonstrate personal jurisdiction, a plaintiff must satisfy the state's long-arm statute and show that the exercise of jurisdiction over the defendant will comport with due process. West Virginia's long-arm statute is "co-extensive with the full reach of due process." *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir.1997) (citing *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525 (4th Cir.1987)). Thus, the inquiry is simply whether the exercise of personal jurisdiction over Newsom is consistent with due process. This hurdle is met if the non-resident defendant has established such minimum contacts in the forum state that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The plaintiff bears the burden of proving grounds for jurisdiction by a preponderance of the evidence. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir.2003) (citing *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59-60 (4th Cir.1993)).

United Financial does not specifically address Newsom's claim for lack of personal jurisdiction. Moreover, the complaint does not present any facts that would suggest that Newsom has the necessary minimum contacts with West Virginia for this Court's exercise of personal jurisdiction over him. Inasmuch as Newsom's underlying injuries took place in Texas and he is not

a party to the insurance policies at issue, the Court lacks personal jurisdiction over Newsom. Accordingly, this action is dismissed as to Newsom. It is unnecessary, therefore, to consider Newsom's motions to dismiss.

B. Actual Controversy

The Court now turns to the motion of FAC Trucking, Frances Cline and Michael Cline to dismiss this action on the grounds that there is not an actual controversy present. The Declaratory Judgment Act confers jurisdiction on the court "in a case of actual controversy." 28 U.S.C. § 2201. Generally, an insurance company's action seeking a declaration that it has no duty to defend or indemnify an insured against a third party's tort claim qualifies as an actual controversy. *Nautilus*, 15 F.3d at 375.

The only support which FAC Trucking, Frances Cline and Michael Cline provide for their motion is their insistence that they are not seeking a defense or indemnification under either policy referred to in United Financial's complaint. Specifically, they state that upon receipt of United Financial's complaint, they informed it that they were not seeking indemnification but that United Financial "would not consent to the voluntary dismissal of its *Complaint for Declaratory Judgment* against Frances Cline, Michael Cline and FAC Trucking and it is forcing their insureds to remain parties to this action in order to facilitate its own interests." (Docket 32 at 3).

United Financial responds that the specific issues constituting a "case or controversy" are as follows:

whether (1) the vehicle involved in the accident was an insured vehicle as defined in each of the policies; (2) coverage is precluded by each policy's employee, fellow employee,

and/or worker's compensation exclusions; and (3) the vehicle involved in the accident was "mobile equipment" as defined in the policy and, this, excluded from coverage in a claim for bodily injury arising from its operation.

(Docket 34 at 3). Also in its response, United Financial invites FAC Trucking, Frances Cline and Michael Cline to sign the Stipulation and Order of Judgment attached to the response as an exhibit. The contention is that if those parties are not seeking a defense or indemnification, then they have reason to sign the stipulation entering judgment for United Financial, rendering moot their motion to dismiss. (Docket 34 at 3). If they refuse to stipulate that the policies referred to in the complaint do not provide coverage for Newsom's injuries and damages, United Financial maintains, then there exists an actual controversy.

FAC Trucking, Frances Cline and Michael Cline did not reply. The docket reflects that none of the parties have signed the stipulation granting United Financial judgment in this action. In light of the general rule cited above that a case such as this one presents an actual case or controversy and the lack of support for the motion to dismiss, other than the parties' word that they will refrain from seeking a defense or indemnification under the United Financial policies, the Court finds dismissal on these grounds to be inappropriate.

V. CONCLUSION

The Court **ORDERS** as follows:

1. That Newsom's Motion to Dismiss, or, Alternatively, Motion to Transfer Venue to the Eastern District of Texas, Beaumont Division [Docket 6] be **GRANTED** to the extent that United Financial's complaint is dismissed against Newsom for lack of personal jurisdiction;


2. That Newsom's Motion for Expedited Hearing, or, in the Alternative, Motion for Expedited Decision [Docket 10] be **DENIED**;

3. That FAC Trucking, Frances Cline and Michael Cline's Motion to Dismiss [Docket 34] be **DENIED**; and

4. That Newsom's Amended Motion to Dismiss, or, Alternatively, to Transfer Venue and Alternative Motion to Stay [Docket 47] be **DENIED** as moot.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: November 30, 2010


IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA