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Table of Contents

Responses

1. **Response: Plaintiff's Response to Motion to Dismiss (Insurance Litigation)**

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO.

Mr. Spouse and
Ms. Spouse,

Plaintiffs,

v.

INSURANCE CORP.,

Defendant.
_____/

PLAINTIFFS' REPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND/OR FOR MORE DEFINITE STATEMENT

Plaintiffs Mr. Spouse and Ms. Spouse ("Plaintiffs") hereby respond in opposition to Defendant Insurance Corporation's ("Defendant") motion to dismiss Plaintiffs' Amended Complaint and/or for more definite statement.

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Regis Ins. Co. v. Miami Mgmt., Inc.*, 902 So. 2d 966, 968 (Fla. 4th DCA 2005). The court must limit its analysis to the four corners of the amended complaint, accept all facts alleged in the amended complaint as true, and draw all reasonable inferences in favor of Plaintiffs. *See, e.g., Mitleider v. Brier Grieves Agency, Inc.*, 53 So. 3d 410, 412 (Fla. 4th DCA 2011). In their Amended Complaint, Plaintiffs allege a breach of contract for the failure of Defendant to provide coverage for property damage sustained "during the removal of opossums found in the attic." Amended Complaint at ¶ 7. Construing this allegation as true, Defendant's assertion that a "legal nullity" exists because it construes the insurance policy to exclude damages from opossum "waste, specifically, the

possum's [*sic*] urine and excrement and/or repair of damage caused by the opossum's excrement" goes outside the four corners of the complaint and creates a factual dispute. Nowhere in the Amended Complaint do Plaintiffs characterize the damage as caused by opossum urine or excrement.

Even if the damage was alleged to have been caused by opossum excrement, the plain language of the insurance contract does not support Defendant's cursory conclusion that such damage is excluded from coverage. The exclusion upon which Defendant relies states:

> We do not insure, however, for loss:
> 1. Involving collapse, other than as provided in Additional Coverage 8;
> 2. Caused by: . . .
> (e) any of the following:. . .
>
> (5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals waste. Waste includes materials to be recycled, reconditioned or reclaimed; . . .

Ex. A to Amended Complaint at p. 7 of 18.[1] The interpretation of insurance contracts is guided by the principle that contracts are construed in accordance with the plain language of the policy, as bargained for by the parties. *Liebel v. Nationwide Insurance Co. of Florida*, 22 So. 3d 111, 115 (Fla. 4th DCA 2009). The court must apply the "ordinary rules of construction" and where a term is not defined, "the common definition of the term should apply." *Id.* Defendant wrongly

[1] It is not clear from this text whether the pollutant must have resulted in a "collapse" as specified in itemized list number 1. To the extent that the policy first requires a collapse caused by a pollutant, neither Plaintiffs nor Defendant have not asserted any such collapse and therefore the exclusion clause does not apply to defeat coverage for this incident.

concludes that the insurance policy clearly intends the definition of pollutants to include opossum urine and excrement, thereby creating an exception to coverage under the policy. The policy does not clearly state that opossum urine or feces is a pollutant under the policy, nor would the common usage of the term pollutant include opossum excrement. Defendant did not cite to a case in Florida interpreting the exception for pollution as applying to animal urine/excrement. It is clear that the provision does not include opossum urine and excrement.

At a minimum, the provision is ambiguous, and thus dismissal is not warranted. "If the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. . . . Ambiguous 'exclusionary clauses are construed even more strictly against the insurance than coverage clauses.' Thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy." *Id.* (quoting *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005)). Defendant cites to the Webster Dictionary to define "waste" as including human or animal excrement, thereby concluding that "pollutant" includes opossum excrement. There is a danger in relying upon a dictionary to interpret words in a contract. The Supreme Court of Florida has recognized that "dictionaries are 'imperfect yardsticks of ambiguity'" and whether a word is ambiguous must be determined "in the context of the specific insurance policy at issue." *Dimmit Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*, 636 So. 2d 700, 704 (Fla. 1993).

In *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, 711 So. 2d 1135 (Fla. 1998), the Florida Supreme Court held that a similar pollution exclusion clause was "clear and unambiguous" and concluded that an ammonia spill at an office and pesticide sprayed on adjacent landowners were pollutants and therefore excluded from coverage. In *Deni*, the court

reasoned that a pollutant means an "irritant" or "contaminant," which in turn means those substances that produce a particular effect. *Id.* at 1139. Because there was evidence in *Deni* that people experienced physical irritation, the substances were pollutants and therefore coverage was excluded. There is no allegation that Plaintiffs suffered from a physical "irritation" here.

In *Florida Farm Bureau Insurance Co. v. Birge*, 659 So. 2d 310 (Fla. 2d DCA 1994), the court found that a similar pollutant exclusion clause was ambiguous regarding whether raw sewage that filled the insured's house was a pollutant. The court supported its conclusions by "the availability of clear and unambiguous language that the insurance company could have used to exclude damage resulting from a backup of raw sewage." *Id.* at 311. Similarly here, it is not clear that the term "pollutant" includes opossum urine or feces. The insurance contract is quite explicit about what it excludes, yet does not identify damage from animal excrement as an exclusion. While Defendant relies on cases from other jurisdictions for its conclusion that pollutants include bat guano, these cases are not binding. Motion at 3, 4 (citing *Marcelle v. Southern Fid. Ins. Co.*, 954 F. Supp. 2d 429 (E.D. La. 2013); *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WL 20, 338 Wis. 2d 761 (2012)).

Defendant has not demonstrated a "legal nullity" that the insurance contract excludes coverage. Plaintiffs have not alleged that the damage is due to opossum urine/excrement in their Amended Complaint, thus the analysis of pollutant has no bearing at this initial stage of the case. Even if the damage were caused by opossum excrement, it is not clear that such substances are pollutants under the insurance contract. Instead, Defendant has raised an issue about the interpretation of terms in the contract, and has cited no binding precedent holding that it is clear that a pollutant includes opossum excrement.

The Plaintiffs request this court deny the motion to dismiss and allow the case to proceed. To the extent that the court finds that a more definite statement regarding damage is necessary, the Plaintiffs request the opportunity to do so.

Responses

2. Response: Plaintiff's Response to Motion to Transfer Venue (Insurance Litigation)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

MS. PLAINTIFF,

Plaintiff,

vs. **CASE NO.:**

DEFENDANT PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO TRANSFER VENUE

Plaintiff, Ms. Plaintiff ("Plaintiff") opposes Defendant Property and Casualty Insurance Company ("Defendant") motion to transfer venue from this court to the United States District Court for the District of Colorado. DE 7. Defendant has not met its burden in establishing that the convenience of the parties and witnesses and the interest of justice required for a transfer of venue under 28 U.S.C. § 1404 weigh in favor of a transfer to the District Court of Colorado.

FACTS AND PROCEDURAL BACKGROUND

Ms. Plaintiff is a resident of Polk County, Florida and is employed as a real estate agent in Polk County, Florida. Plaintiff Affidavit at ¶¶ 2, 12. Defendant issued Renter's Policy No. to Plaintiff while Plaintiff was living in Colorado. *Id.* at ¶ 3. While this policy was in effect, Plaintiff's personal property was stored and transported by Movers Moving Systems ("Movers") from Colorado to Florida. *Id.* at ¶ 6. According to the Motion, Movers subcontracted the move to Subcontractor Moving Systems. DE 7 at 2, 5.

Upon delivery of Plaintiff's personal property to Florida, Plaintiff discovered personal property was missing, and that much of what was delivered was damaged. Plaintiff Affidavit at ¶¶ 8, 10-11. The damaged property is located in Florida [Address]**.** *Id.* at ¶ 9.

Plaintiff intends to testify at the trial, and present the testimony of her husband and a representative of the company that provided a damage estimate, Public Adjuster, who reside in Florida. Plaintiff Affidavit at ¶¶ 10, 13, 18. Having to travel to Colorado for a trial presents a financial burden on Plaintiff and her husband. *Id.* at ¶ 14-19.

Defendant asserts in its motion that "important non-party witnesses are based in Colorado," without providing names, addresses or the subject matter of the testimony. DE 7 at 9. Defendant's list of witnesses are merely identified as follows:

> (1) the packers and movers associated with Movers, along with those Movers agents and employees dealing with storage and also claims administration; (2) the movers associated with Subcontractor that picked the goods up in Colorado for transport to Florida; and (3) the agents and employees of the Douglas County Sheriff, who have likely investigated and obtained important details about this claim.

DE 7 at 9. There is no evidence that any person associated with these companies and the move that happened more than three years ago reside in Colorado.

Based upon information obtained by Plaintiff, Defendant is a corporation with its principal place of business in San Antonio, Texas, and is authorized to, and is transacting business in Polk County, Florida. Plaintiff Affidavit at ¶¶ 4, 5**.** The custodian of records who provided the certified copy of the policy was located in Texas, and the address of the Defendant is listed as Texas on the policy itself. D.E. 7-1 (Ex. A to Motion). Based upon information obtained by Plaintiff from the website of Movers, its corporate headquarters are located in California. Plaintiff Affidavit at ¶ 7. The address for Movers on its "Interstate Uniform Household Goods Bill of Lading" and

"Household Goods Descriptive Inventory" is in California. DE 7-2; DE 7-3. Plaintiff has no knowledge of Subcontractor's principal place of business.

ARGUMENT

Defendant's motion to transfer venue is premised on 28 U.S.C. § 1404(a), which provides, in part, that "for the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The threshold issue is whether this action based on diversity of citizenship could have been brought in the District Court of Colorado. *Jewelmasters, Inc. v. May Department Stores Co.*, 840 F.Supp. 893, 894 (S.D. Fla. 1993). Plaintiff does not contest that this action could have been brought in the District Court of Colorado. This court must determine whether Defendant has sufficiently demonstrated that convenience to the parties and witnesses and the interest of justice warrant a transfer from this court.

In determining whether to transfer venue, a district court has broad discretion. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 255 (11th Cir. 1996) (review of district court's determination is based on clear abuse of discretion); *Sterling v. Provident Life and Accident Insurance Co.*, 519 F.Supp.2d 1195, 1203 (M.D. Fla. 2007). As the party seeking a transfer, Defendant has "the burden of proof, and must make a convincing showing of the right to transfer." *Garay v. BRK Electronics*, 755 F.Supp. 1010, 1011 (M.D. Fla. 1991); *see also, Surco Products, Inc. v. Theochem Laboratories, Inc.*, 528 F.Supp. 677 (S.D. Fla.) (1981) (moving party "has the burden of satisfying the Court by a clear showing that the balance of conveniences fall toward him."). "In determining the propriety of the transfer, the Court must give considerable weight to Plaintiff's choice of forum." *Response Reward Systems, L.C. v. Meijer, Inc.*, 189 F.Supp.2d 1332, 1340-41 (M.D. Fla. 2002).

The Eleventh Circuit has identified the following nine (9) factors to aid courts in assessing where the balance of convenience and the interests of justice lies. *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005); *Trinity Christian Center of Santa Ana, Inc. v. New Frontier Media, Inc.*, 761 F.Supp.2d 1322, 1326 (M.D. Fla. 2010). These factors are: (1) convenience of the witnesses; (2) location of relevant documents and the relative ease of access to sources of proof; (3) convenience of the parties; (4) where the operative facts took place; (5) availability of process to compel attendance of an unwilling witness; (6) relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and interests of justice, based upon the totality of circumstances. *Trinity Christian* Center, 761 F.Supp.2d at 1326. "Only if the Plaintiff's choice is clearly outweighed by considerations of convenience, cost, judicial economy, and expeditious discovery and trial process should this Court disregard the choice of forum and transfer the action." *Response Reward*, 189 F.Supp.2d at 1340 (emphasis added).

As detailed below, Defendant argues that only three factors (convenience of witnesses, governing law, and weight accorded plaintiff's choice of forum) weigh in favor of venue in Colorado. Yet in asserting these factors, Defendant has not provided any sworn testimony to support its conclusory statements. Defendant has not demonstrated that the interest of justice favors Colorado or that Colorado is more convenient than Florida. Even if Defendant has demonstrated that venue in Florida is inconvenient for its witnesses, a mere shift in the balance of convenience from one party to another will not suffice to demonstrate that a change in venue is warranted. *See, e.g., Robinson*, 74 F.3d 253 at 260.

A. The Convenience of Witnesses Does Not Weigh in Favor of Transfer to Colorado.

Defendant provides no specifics regarding the names or locations of third-party witnesses it plans to present, or what each witnesses' testimony will be. A court cannot rely upon conclusory statements with no supporting affidavits or testimony in weighing evidence supporting this factor. *See, e.g,, Surco,* 528 F.Supp. 677; *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 136 F.Supp.2d 1271, 1282 (S.D. Fla. 2001) (citing *Oller v. Ford Motor Co.*, 1994 WL 143017, *3 (M.D. Fla. Mar. 30, 1994)).

In *Surco,* the motion to transfer was not "accompanied by affidavits or any other form of proof supporting its entitlement to a transfer," but contained "merely conclusory assertions as to the merits of its entitlement to a change a venue" and a few facts that did not satisfy the clear showing necessary. *Id.* at 679. A court "may properly consider only those facts which are undisputed or are a matter of record in the form of affidavits, depositions or stipulations." *Id.* at 679. Defendant presented no affidavit, deposition or stipulation regarding the "facts" asserted. Moreover, because Defendant has not specifically identified the substance of any witness testimony, there is no showing that the witnesses could not be effectively presented by depositions. *See, e.g., Garay*, 755 F.Supp. at 1012.

Defendant has not demonstrated that the convenience of witnesses weighs in its favor.

B. The Location of Relevant Documents and Ease of Access to Sources of Proof Does Not Favor Transfer.

Defendant provides no evidence or argument that the sources of proof or relevant documents are located in Colorado or that it would be burdensome to transport documents or other proof to a Florida court. In fact, Defendant appears to have already provided relevant documents in its filing: a certified copy of the policy (Exhibit A) (DE 7-1), the bill of lading from Movers

(Exhibit B) (DE 7-2), a descriptive inventory prepared by Moise's Moving Systems (Exhibit C), the Transportation Loss Report (Exhibit D) and Offense/Incident Report (Exhibit E).

If the property at issue is considered to be a source of proof, that property is no longer located in Colorado, but in Florida. Moreover, because the stolen items have not been located, there is no longer a connection between the personal property and Colorado. *See, e.g., Garay*, 755 F.Supp. at 1012 (because the house in which the fire occurred was no longer standing, and witnesses were available for deposition regarding the investigation of the fire, the ease of access to sources of proof was neutral). There is no property to assess in Colorado.

The location of documents and ease of access to sources of proof does not favor transfer, because Defendant easily provided and filed documents it deemed relevant. There are no assertions that relevant documents, or any other evidence for that matter, are located in Colorado and that such location causes an inconvenience or impairment to Defendant's defense. This factor favors Plaintiff's choice of venue.

C. The Convenience of Parties Weighs In Favor of Florida.

Defendant does not argue that a trial in Colorado is more convenient than a trial in Florida. In fact, Defendant's principal place of business, and the signatories to the insurance policy are in Texas. Plaintiff Affidavit at ¶ 5; D.E. 7-1 (Ex. A to Motion). Thus it is unclear from whence Defendant's representatives, witnesses and attorney will travel. Conversely, Plaintiff has demonstrated in her affidavit that traveling to Colorado for a trial is inconvenient and would require additional travel expenses, as well as additional attorney's costs. Plaintiff Affidavit at ¶¶ 12-19. The convenience of the parties weighs in favor of venue in Florida.

D. The Locus of Operative Facts Weighs in Favor of Florida.

Plaintiff claims damage to personal property that is located in Florida. Complaint at ¶¶ 7, 10, 14; Plaintiff Affidavit at ¶ 9. There is no sworn testimony regarding exactly where the damage to the property occurred, or even where the theft itself occurred. Thus, a determination of damages does not require that this action be heard in Colorado. Regarding the interpretation of the contract itself, neither jurisdiction presents a better forum. Defendant's principal place of business is in Texas, thus a Florida court does not create more or less inconvenience to Defendant than a Colorado court. This factor weighs against a transfer.

E. Availability of Process to Compel Attendance of Unwilling Witnesses is Neutral.

Because Defendant has not presented any sworn testimony or details regarding the identity or location of the witnesses, this Court cannot assume that process to compel attendance is at issue for a majority of the witnesses. Not a single witness has been identified as a resident of Colorado.

F. Relative Means of the Parties Favors Venue in Florida.

Plaintiff is not a corporation, but is employed as a real estate in Florida. Plaintiff Affidavit at ¶ 12. Defendant is a corporation, licensed to do business in Florida, among other states. Plaintiff Affidavit at ¶ 5. Courts have recognized that such disparity in relative means is a relevant factor that could weigh against transfer. *Sterling*, 519 F .Supp. 2d at 1207.

G. Transfer is Not Required Even If Colorado Law Applies.

If the policy is subject to Colorado law, a Florida federal court is quite capable of interpreting and applying the law of another state. *See, e.g.*, *Sterling*, 519 F.Supp.2d at 1208 (finding Florida federal court competent to apply foreign law). While in some instances, the choice of law may weigh in favor of transferring venue, *see., e.g., Garay,* 755 F.Supp. at 1012,

this factor is not strong enough to overcome the totality of the analysis that weigh more heavily in favor of Plaintiff's choice of venue in this court.

Defendant's reliance on two cases outside of the Eleventh Circuit's jurisdiction for the proposition that familiarity with state law "**may** be determinative in a particular case, even if the convenience of the parties and witnesses might call for a different result" is inapposite. DE 7 at 8,9 (citing *TIG Ins. Co. v. Brightly Galvanized Products, Inc.*, 911 F.Supp. 344, 346 (N.D. Ill. 1996) (emphasis added); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986). Not only do these cases have no precedential value for this court, the facts in *Coffey* and *TIG* are readily distinguishable, and Defendant's legal interpretation is not supported by those cases, or the case law in this jurisdiction.

Neither the *TIG* court nor the *Coffey* court found that the choice of law issue alone was the determinative factor favoring a transfer of venue. In *Coffey*, the court denied the motion to transfer, finding that plaintiff raised the issue of convenience of the parties for the first time on appeal in her reply brief and could not be considered on appeal, and that the argument regarding choice of law did not support a transfer. *Coffey*, 796 F.2d at 221-22. Similarly, the *TIG* court found that virtually all evidence and witnesses were located in the plaintiff's chosen forum location and that forum state's law applied. *TIG*, 911 F.Supp. at 346-47. Thus, the choice of law analysis was not the determinative factor in *TIG*.

Here, whether Colorado or Florida law applies is neutral for determining whether transfer is appropriate.

H. Defendant Has Failed to Establish That It Can Overcome the Great Weight Accorded to Plaintiff's Choice of Venue

"The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations." *Robinson*, 74 F.3d at 260 (quoting *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. Unit B 1981), cert. denied., 456 U.S. 918, 102 S.Ct. 1775, 72 L.Ed.2d 178 (1982)); *see also Garay*, 755 F.Supp. at 1011 ("Unless the balance strongly favors defendant, plaintiff's choice of forum will rarely be disturbed."). Plaintiff's choice of a Florida court "is generally a factor heavily weighed in the plaintiff's favor." *Christian Center*, 761 F.Supp.2d at 1330. In its attempt to reduce the significance the Eleventh Circuit has historically placed on the plaintiff's choice of venue, Defendant attempts to argue that no significant connection exists between Florida and the matter at issue. This simply is not the case. The case arises out of a breach of an insurance contract based on Defendant's failure to cover damages for the loss of some personal property, and damage to other personal property that was moved from Colorado to Florida, insured by a company with its headquarters in Texas, for a policy issued in Colorado. At issue, among others, is the value of the damaged property transported to Florida where Plaintiff discovered the loss and the damage, and where she resides. As identified in the analysis of all other factors, Defendant has not presented facts that outweigh the presumption in favor of the Plaintiff's choice of venue.

I. Consideration of Trial Efficiency and Interests of Justice Is Neutral

The trial efficiency issue is a neutral factor here. Based upon the Federal Court Management Statistics for June 2014, civil cases in the District Court of Colorado take longer from filing to trial than civil cases in the Middle District of Florida. *See* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-june-2014.aspx. For the twelve month period ending June 30, 2014, the median time from filing to trial in Colorado was 29.3 months, compared to 24.7 months in the Middle District Court of

Florida. *Id.* However, filing to disposition was better in Colorado: 5.7 months for Colorado v. 7.7 months for the Middle District of Florida. *Id.* Thus, this factor is neutral.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Transfer should be denied.