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FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ANTONIA DELEON GUERRERO VILLAGOMEZ, JULIA VILLAGOMEZ GARRIDO, a minor, by and through her personal representative, JULIE VILLAGOMEZ, BARBARA DELEON GUERRERO VILLAGOMEZ, by and through her personal representative, DANIEL T. VILLAGOMEZ, Plaintiffs, vs. **EDWARD MANIBUSAN and MARIANAS INSURANCE CO., LTD.,** Defendants.	**CIVIL CASE NO. 02-0015(C)** **ORDER DENYING MOTION TO STRIKE PLAINTIFFS' AND DEFENDANT MANIBUSAN'S STIPULATED JUDGMENT AND ORDER**

I. INTRODUCTION

THIS MATTER came for hearing on July 29, 2010 at 1:30 p.m. in Courtroom 223A for Defendant Marianas Insurance Co., LTD.'s, (hereinafter "MICO") Motion to Strike. MICO was represented by attorney, Mark A. Scoggins. Antonia Deleon Guerrero Villagomez, et al., (hereinafter "Plaintiffs") were represented by attorney, David G. Banes. MICO filed the present motion to strike Plaintiffs' and Defendant Edward Manibusan's (hereinafter "Defendant Manibusan") Stipulated Judgment and Order filed on May 21, 2010.

For the reasons discussed below, the Court **DENIES** MICO's Motion to Strike.

II. BACKGROUND

On or about September 1, 1999, MICO issued an automobile insurance policy to Defendant Manibusan covering a 1996 Toyota Corolla. On January 29, 2000, James H. John, a nephew of Mr. Manibusan's daughter collided with Plaintiff Antonia Villagomez and a few other passengers. As a result of the accident, Plaintiffs were seriously injured and filed claims with MICO. After investigating the accident MICO denied coverage based on the definition of "insured" in the insurance policy and because the driver of the vehicle did not have a valid driver's license at the time of the accident.

On January 15, 2002, Plaintiffs filed a Complaint against Defendant Manibusan and MICO seeking damages and compensation for their injuries. Because MICO failed to provide the Manibusans with a defense to their prior lawsuit, the Manibusans were required to retain and pay for their private counsel, Perry B. Inos. Thereafter, Plaintiffs attempted to settle with MICO for $30,000, however, MICO chose not to settle.

On July 3, 2003, Judge Lizama issued an Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment. Judge Lizama found that Mr. John was insured under the policy. MICO appealed this decision, but on October 16, 2006, the CNMI Supreme Court issued an Opinion in Appeal No. 03-0040 finding that MICO had appealed from a non-final judgment, and the appeal was dismissed for lack of jurisdiction.

Meanwhile, as MICO was working on its appeal, Defendant Manibusan negotiated with Plaintiffs to prepare a bad faith action against MICO. Both parties entered into an Assignment of Causes of Action, whereby the Manibusans assigned their different causes of action to Plaintiffs. On December 30, 2003, Plaintiffs and Defendant Manibusan filed a Notice of Filing of Assignment of Cause of Action (hereinafter "2003 Assignment") assigning all their causes of action against MICO to Plaintiffs who in turn, agreed not to execute the excess portion of their judgment against Defendant Manibusan.

On February 11, 2004, Plaintiffs and Defendant Manibusan filed a new action against MICO alleging, among other things, bad faith. On March 18, 2010, MICO filed an Amended Motion for Summary Judgment arguing that the bad faith claim was not yet ripe for adjudication in Civil Action No. 04-0070 since no judgment has been entered in Civil Action No. 02-0015.

On May 12, 2010, Plaintiff Antonia Villagomez filed a Motion to Substitute her personal representative, Daniel T. Villagomez for Barbara DLG Villagomez since he had passed away.

On May 21, 2010, Defendant Manibusan and Plaintiffs entered into a Settlement Agreement whereby Plaintiffs agreed not to sue Defendant Manibusan and in consideration for that agreement Defendant Manibusan assigned his rights to sue MICO to Plaintiffs and both parties agreed that the Assignees would receive the first $100,000 and the rest would be divided equally between the Assignor ("Manibusans") and Assignees ("Villagomezes").

On May 21, 2010, MICO filed an Objection to a Stipulated Judgment between Plaintiffs and Defendant Manibusan arguing that MICO still remained a Defendant in this matter and thus, still wished to avail itself of its right to defend the case. On June 16, 2010, MICO filed a Motion to Strike the Stipulated Judgment Plaintiffs and Defendant Manibusan entered into on May 21, 2010.

MICO argues that the Stipulated Judgment cannot bind MICO and should be stricken as futile. MICO further argues that this is just an attempt to cure the ripeness problem in Plaintiffs' bad faith claim in Civil Action 04-0070. Finally, MICO argues that Defendant Manibusan may not stipulate to a judgment without MICO's consent citing the "no action clause" in the Manibusans' insurance contract.

On July 8, 2010, MICO filed a Supplemental Memorandum in Support of Motion to Strike arguing that Defendant Manibusan is not a party to this action anymore since he assigned all of rights to Assignees on December 3, 2003, which was approved on January 6, 2004 by Judge Lizama. Therefore, MICO contends that Defendant Manibusan does not have the capacity to stipulate to the judgment.

On July 12, 2010, Plaintiffs filed an Opposition arguing that MICO wrongfully did not provide any defense to Defendant Manibusan exposing him to potential financial ruin and further refused to settle within

policy limits. In addition, since the Court had already heard evidence and decided against MICO finding that it had no reasonable grounds for contesting coverage, MICO cannot now jump in and claim that the Manibusans had no right to enter into a Stipulated Judgment without MICO's consent as long as the Settlement was entered into in good faith.

On July 13, 2010, Plaintiffs filed an Opposition to the Supplemental Memorandum filed by MICO on July 8, 2010 arguing that the supplement was: (1) untimely because it contains no newly discovered evidence; (2) borders on lack of candor with the Court because MICO failed to attach a copy of the Order Approving Settlement; (3) the Assignment uses the future tense "shall" which is a condition subsequent. As such, Plaintiffs argue that the Court Order never dismissed Defendant Manibusan, instead it merely approved the Settlement Agreement and took the matter off-calendar. Therefore, Plaintiffs argue that if Defendant Manibusan had been dismissed there would have been an order dismissing him pursuant to Commonwealth Rule of Civil Procedure 41, which never occurred.

III. DISCUSSION

A. Although the 2003 Assignment was Valid, Defendant Manibusan was not Properly Dismissed From Civil Action No. 02-0015.

After reviewing the file, the Court finds that there was no express order dismissing Defendant Manibusan from Civil Action No. 02-0015. As such, the Court will turn to the 2003 Assignment to determine what, if any, effect the Assignment had on dismissing Defendant Manibusan from Civil Action No. 02-0015.

On December 30, 2003, Plaintiffs gave notice to the Court that they were filing a fully executed Assignment of Cause of Action for Civil Action No. 02-0015. Paragraph 8 of the Assignment states:

> "Assignors and Assignees wish to resolve Assignees' claim against Assignors on the basis that Assignors will assign their causes of action against MICO to Assignees in exchange of a promise by the Assignees *not to execute the portion of the judgment exceeding the policy limits upon Assignors' assets*." *Assignment of Cause of Action*, Pg. 2, ¶8. (Emphasis Added).

Pursuant to the Assignment, Plaintiffs agreed not to hold Defendant Manibusan liable for any portion of the judgment exceeding the $30,000 policy limit.[1] Therefore, Defendant Manibusan was still a party to the suit, albeit he was cloaked with the protection of limited liability. Notwithstanding the foregoing, the parties did indicate their intent to dismiss Defendant Manibusan in paragraph 6 of said Assignment:

> "Assignees shall dismiss Assignors in Civil Action No. 02-0015C." *Assignment of Cause of Action*, Pg. 4, ¶6.

MICO contends that although Judge Lizama did not expressly dismiss Mr. Manibusan from Civil Action No. 02-0015, Mr. Manibusan nonetheless was dismissed by way of the "approved settlement documents...incorporated into the January 6, 2004 order." *MICO's Reply to Oppositions*, Pg 2, ¶ 2. MICO further contends that these actions satisfied the requirements of Commonwealth Rules of Civil Procedure 41(a)(2). The Court disagrees.

NMI R. Civ. P. 41(a)(2) provides:

> "*By Order of Court.* Except as provided in paragraph (I) of this subdivision of this rule, an action shall not be dismissed at the plaintiffs instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under the paragraph is without prejudice." NMI R. Civ. P. 41(a)(2).

Notwithstanding the parties express intent to dismiss Defendant Manibusan from Civil Action No. 02-0015, the parties could not do so without the Court's involvement. Moreover, based on the Assignment itself, the Assignment plainly states that the parties agreed not to execute a judgment in excess of the policy limits which shows that Defendant Manibusan was not completely dismissed from this action, but instead benefitted from limited liability. In other words, had the parties wished to dismiss Defendant Manibusan

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[1] E.g., if the Court were to enter a judgment in favor of Plaintiff for $50,000 and the insurance policy limit is $30,000, based on the Assignment, Defendant Manibusan would not be liable to Plaintiffs for the additional $20,000 and MICO would be required to pay the $30,000 policy limit. However, if MICO went belly up Defendant Manibusan would still be required to pay the $30,000 policy limit, albeit he would not have to pay the additional $20,000. As such, the Assignment, does not dismiss Defendant Manibusan from Civil Action No. 02-0015 absolving him of all liability, but instead keeps Defendant Manibusan as a party to this action with limited liability.

from Civil Action No. 02-0015, they would have done so immediately by releasing him of all potential liability and sought a Court order of dismissal. Here, this was simply not the case.

B. Defendant Manibusan Was Able To Enter Into A Stipulated Judgment With Plaintiffs Without MICO's Consent.

MICO states that "[it] has not and does not stipulate to the judgment, and still wishes to avail itself of its right to defend the case." *See* Objection to Stipulated Judgment, Pg. 2. The Court finds that MICO does have a right to defend itself since it is not a party to the Stipulated Judgment. As written, the Stipulated Judgment simply releases Defendant Manibusan from excess liability, but in no way, shape or form dismisses MICO from this action or from liability. Therefore, MICO does have an opportunity to defend itself in this action.

MICO further argues that Defendant Manibusan may not stipulate to a judgment without MICO's consent per the "no action clause" in Defendant Manibusan's insurance contract with MICO. *See* Memorandum in Support of Motion to Strike, Pg. 5-6. MICO states that the "no action clause provides that no action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy..." and "the obligation to pay shall have been finally determined either by judgment [sic] against the insured after actual trial or by written agreement of the insured, the claimant, and the company." *Id.*

Alternatively, Plaintiffs contend that since MICO breached the policy first by refusing to provide a defense or settle within policy limits, MICO cannot now rely on the language in the policy to prevent settlement. The Court agrees.

"An insured may assign to the claimant his cause of action against the insurer for breach of the implied covenant "without consent of the insurance carrier, even when the policy provisions provide the contrary." *Murphy v. Allstate Ins. C.*, 17 Cal.3d 937, 942 (1976). In addition, a denial of liability may render inoperative provisions for the benefit of the company precedent to right of action. *Maxime Albert v. Maine Bonding and Casualty Company*, 64 A.2d 27, 29 (1949). Moreover, in *Southern Guaranty*

Insurance Company, the Georgia Supreme Court opined:

> "Liability policies generally include provisions that prohibit an insured from settling claims without the insurer's approval. These provisions enable insurers to control the course of litigation concerning such claims, and also serve to prevent potential fraud, collusion and bad faith on the part of insureds. However, an insurer has a correlative duty to defend its insured against all claims covered under a policy, even those that are groundless, false, or fraudulent. An insurer that refuses to indemnify or defend based upon a belief that a claim against its insured is excluded from a policy's scope of coverage '[does] so at its peril, and if the insurer guesses wrong, it must bear the consequences legal or otherwise, of its breach of contract'. In Georgia, an insurer that denies coverage and refuses to defend an action against its insured, when it could have done so with a reservation of its rights as to coverage, "*waives the provisions of the policy against a settlement* by the insured and becomes bound to pay the amount of any settlement [within a policy's limits] made in good faith[,] plus expenses and attorneys' fees." *Southern Guaranty Insurance Company v. Dowse et al.*, 605 S.E.2d, 27, 28-29 (2004)(Emphasis Added).

Here, it is undisputed that MICO denied coverage after investigating the accident based on the definition of "insured" in the insurance policy. In addition, MICO failed to provide the Manibusans with a defense to their lawsuit, and further refused to settle within the $30,000 policy limit. On July 3, 2003, Judge Lizama determined that MICO was estopped from disputing coverage and stated that MICO "may not deny coverage, at least as to plaintiffs..." *See* Order Denying Motion for Reconsideration.

MICO argues that after the July 3, 2003 decision, MICO made an offer, in writing, to defend Mr. Manibusan, to allow him to keep his own attorney, and even to make him whole by paying all attorney's fees previously incurred. *See* MICO's Reply to Oppositions, ¶8. MICO claims that Defendant Manibusan refused these advances and instead, conjured up a bad faith claim against MICO.

Notwithstanding MICO's argument, the Court finds that "[a] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. *National Steel Corporation v. Golden Eagle Insurance*, 121 F.39 496, 499 (1997) citing *Montrose Chemical Corp. of Cal. v. Superior Court*, 861 P.2d 1153 (1993). The existence of a duty to defend turns upon the facts known to the insurer at the inception of the lawsuit, not upon the ultimate adjudicaton of coverage. *Id.* The duty to defend arises if the facts known to the insurer indicate a potential or possibility for indemnity. *Montrose* at 300. An insurer has no duty only if, at the time of its decision, it can prove that the claim cannot fall within policy coverage.

Id. Therefore, while the Court reserves its ruling on whether or not MICO's initial refusal to defend Defendant Manibusan constituted bad faith, the Court finds that at the very least, MICO's initial denial of coverage rendered inoperative provisions of the policy, more specifically the "no action clause." Thus, Defendant Manibusan did have a right to enter into a Stipulated Judgment with Plaintiffs without MICO's consent. The next issue to address is whether or not the $100,000 Stipulated Judgment was reasonable and entered into in good faith.

C. The Court Applied the *Ayers* Approach to Determine Whether the Stipulated Judgment Was Reasonable and Entered Into In Good Faith.

Plaintiffs argue that reasonable settlements made in good faith are binding against insurers who have failed to properly defend their insureds.[2] Plaintiffs do note however how courts differ as to which party bears the burden of proving the agreement is reasonable - some courts do not allow the insurer to contest the reasonableness of insurance agreements and find them binding against insurers who have failed to properly defend their insureds[3], while others have held that such agreements are presumptively valid and the insurer must show that they were made in bad faith.

Plaintiffs argue that this Court should adopt the Ninth Circuit approach which has held that settlement agreements are presumptively reasonable when made in good faith and the insurer has the duty to prove otherwise. Under this approach, Plaintiffs argue that courts need not look behind consent judgments to determine if they are reasonable. *Consolidated American Ins. Co. v. Mike Soper Marine Servs*., 951 F.2d 186, 190 (9th Cir. 1991).

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[2] "If an insurer' erroneously denies coverage and/or improperly refuses to defend the insured in violation of its contractual duties, 'the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement...' " *Isaacson v. California Ins. Guarantee Assn.*, 44 Cal.3d 775, 791 (1988).

[3] California courts have held that a reasonable stipulated judgment, given in exchange for a covenant not to execute is presumptive evidence of liability. *National Steel Corporation v. Golden Eagle Insurance*, 121 F.39 496, (1997) citing *Consolidated American Ins. Co. v. Mike Soper Marine Servs*., 951 F.2d 186, 190 (9th Cir. 1991). "Where an insurer breaches its duty to defend and rejects a reasonable settlement offer within policy limits, the insurer is liable to the injured plaintiff for an assigned settlement obtained in exchange for a covenant not to execute against the insured." *Id.*

Alternatively, MICO asks this Court to follow the approach set forth in *Ayers. Ayers v. C&D Gen. Contrs.*, 269 F. Supp. 2d 911, 916 (W. D. Ky. 2003). MICO argues that this "method provides a degree of protection to the insurance companies (as well as insureds) against the possibility of collusion that is present in this case." *See* Reply to Oppositions, ¶9. In *Ayers*, the court adopted the following approach:

> "...an insured only has the initial burden of producing evidence that the settlement is "prima facie reasonable in amount and untainted by bad faith." Once the insured satisfies this burden, the burden shifts to the insurer to show, by a preponderance of evidence, that it is not liable because the settlement is neither reasonable nor reached in good faith. *Id.*

Employing this standard, MICO contends that Plaintiffs have not established that the settlement figure is "prima facie reasonable in amount" or that the settlement agreement has been reached in good faith. In view of the five month period MICO tried to provide Defendant Manibusan with coverage, as well as the protection this approach affords to both parties, the Court will follow the *Ayers* approach to determine whether the Settlement was reasonable and untainted by bad faith.

i. Plaintiffs Have Established that their Settlement Figure is Prima Facie Reasonable in Amount?

Whether the settlement was reasonable and prudent depends on what a reasonably prudent person in the insured's position would have settled for on the merits of the claimant's case. *Cambridge Mut. Fire Ins. Co. v. Perry*, 692 A.2d 1388, 1391 (1997). This determination involves evaluating the facts bearing on the liability and damage aspects of the claimants case, as well as the risks of proceeding to trial. *Id.* citing *United Servs. Auto Ass'n v. Morris*, 741 P.2d 246, 254 (Ariz. 1987).

In the present case, Plaintiffs argue that the $100,000 Settlement is reasonable since "[l]iability is obvious as the driver of the subject vehicle admits he ran a red light..." *See* Opposition to Motion to Strike, Pg. 13. Plaintiffs further contend that "damages are significant...[since] Ms. Villagomez...spent nine days in the hospital [and]suffered a fractured sternum...[and] Ms. Garrido suffered a broken femur and incurred thousands of dollars in medical bills." *Id.* at 13-14. Plaintiffs state in no uncertain terms that Ms. Villagomez's "claim alone is worth the settlement amount of $100,000." *Id.*

Alternatively, MICO argues that Plaintiffs have not met their burden to show that the Settlement is reasonable. MICO claims that Defendant Manibusan colluded with Plaintiffs to create an unreasonable judgment in this case after MICO offered to defend Defendant Manibusan. Moreover, MICO claims that Defendant Manibusan should never have been working with Plaintiffs in the first place and "ha[d] little or nothing to lose [by entering into this Settlement Agreement] because he [would] never be obligated to pay" an excess of the Stipulated Judgment. *See* Reply to Oppositions, ¶10.

Notwithstanding MICO's argument, the Court finds that Defendant Manibusan was entitled to assign his causes of action to Plaintiffs in turn for an agreement not to execute.[4] In addition, Plaintiffs were allowed to enter into a reasonable settlement with Plaintiffs. As such, the Court finds that Plaintiffs have met their burden of showing that the $100,000 Settlement is prima facie reasonable in light of the parties' injuries, medical expenses, and liability.

ii. Plaintiffs Have Established that their Settlement Was Reached in Good Faith.

Perhaps the biggest point of contention is whether or not this Settlement was reached in good faith. Plaintiffs argue that the $100,000 Settlement was reached in good faith and is not the subject of collusion.

Alternatively, MICO counters by arguing that the Settlement was reached solely for the purpose of remedying a ripeness problem in Civil Action No. 04-0070. MICO supports its claim by arguing that a stipulated judgment combined with an agreement not to execute is collusive. MICO cites *McLaughlin v. National Union Fire Insurance Co.*, urging this Court to examine the five factors used to determine if an assignment, agreement not to execute, and settlement are collusive. *McLaughlin v. National Union Fire Insurance Co.*, 23 Cal. App. 4th 1132, 1153 (Cal. Ct. App. 1994).

After reviewing the five factors set forth in *McLaughlin*, the Court does not find these factors to be particularly helpful to MICO especially since "[e]ach case develops its own dynamic and has its own mix

[4] In the 2003 Assignment, both parties estimate that "damages can be fairly and reasonably valued to be at least $100,000." *See* Notice of Filing of Assignment of Cause of Action, ¶5.

of procedures and circumstances which should be evaluated to determine whether the problems of collusion and prejudice are substantially diminished in that case." *Id.* at 1154. As such, the Court believes that *Pengilly Masonry, Inc.*, has set forth a better approach used to determine collusiveness, holding that a "cognizable claim of collusion requires evidence that the injured party ha[s] no substantial claim or chance of recovery and that the parties permitted a judgment in the injured party's favor that was disproportionate to the injuries." *Pengilly Masonry, Inc. v. Aspen Ins. UK Ltd.*, 674 F.Supp.2d 1150, 1158 (ED Cal. 2009).

In this case, MICO has not stated how the proposed $100,000 Settlement was "disproportionate to the injuries" sustained by Plaintiffs. Instead MICO's entire argument is premised on the fact that Defendant Manibusan had no right to enter into a Settlement Agreement with Plaintiffs without MICO's consent per the "no action clause" in the policy agreement and the 2003 Assignment. Notwithstanding those arguments, the Court finds that Plaintiffs have established that the settlement figure is "prima facie reasonable in amount" and was reached in good faith. The Court further finds that MICO has failed to show, by a preponderance of evidence that it is not liable because the Settlement was neither reasonable nor reached in good faith.

IV. CONCLUSION

For the foregoing reasons, MICO's Motion to Strike is hereby **DENIED.**

SO ORDERED this 16th day of November, 2010.

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David A. Wiseman, Associate Judge