STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 460-9-04 Wrcv

SCOTT MANN and the ESTATE OF NATHAN LABRECQUE,

Plaintiffs,

v.

ADVENTURE QUEST, INC. d/b/a THE ACADEMY AT ADVENTURE QUEST and PETER DRUTCHAL a/k/a PETER KENNEDY a/k/a PETER DRUTCHAL-KENNEDY,

Defendants.

VIRGINIA SURETY COMPANY, INC.,

Plaintiff in Intervention,

v.

ADVENTURE QUEST, INC., PETER DRUTCHAL, SCOTT MANN, and the ESTATE OF NATHAN LABRECQUE,

Defendants in Intervention.

DECISION RE: PLAINTIFF-IN-INTERVENTION VIRGINIA SURETY COMPANY, INC.'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT AND SCOTT MANN'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Plaintiff-in-Intervention Virginia Surety Company, Inc.'s ("Virginia Surety's") Renewed Motion for Partial Summary Judgment[1], filed October 15, 2013, and Scott Mann's ("Mr. Mann's") Cross-Motion for Summary Judgment, filed November 8, 2013.

BACKGROUND

[1] This motion is now relevant only with respect to Mr. Mann because, as the court was informed by letter filed January 24, 2014, Virginia Surety has reached a conditional settlement with the Estate of Nathan LaBrecque.

On September 16, 2004, Mr. Mann and Nathan Labrecque (collectively, "Plaintiffs") filed suit against Adventure Quest, Inc. and Peter Drutchal (collectively, "Defendants") alleging that Defendants' negligence had injured Plaintiffs.[2]

Adventure Quest had been issued two insurance policies, one for 1994-1995 and another for 1995-1996, which potentially covered the injuries alleged by Plaintiffs. Because of these policies, Virginia Surety intervened in this case on June 15, 2006, arguing that it was the real party in interest with respect to Plaintiffs' claims. Separate trials on Plaintiffs' negligence claims occurred in 2013. Despite these proceedings, the question of whether Adventure Quest's insurance policies should cover Mr. Mann's injuries remains unresolved.

In an attempt to simplify the dispute over insurance coverage, Virginia Surety filed its renewed motion for partial summary judgment on October 15, 2013, seeking a declaratory judgment as to which injuries Mr. Mann can recover for and the maximum amount of damages that Mr. Mann can recover. On November 8, 2013, Mr. Mann opposed this motion, countering that Judge DiMauro has already ruled that $2,000,000 was available for coverage, that the insurance policies covered incidents of abuse that occurred after the expiration of those policies, and that Virginia Surety had waived certain defenses by failing to raise them earlier. Mr. Mann also cross-moved for summary judgment on the amount of coverage available, the relevant time period for instances of abuse, the question of whether Adventure Quest was an insured party under the policies, and the claim that there is no evidence that Virginia Surety suffered prejudice by allegedly receiving late notice of Mr. Mann's claims against Adventure Quest.

On December 2, 2013, Virginia Surety filed a reply in support of its motion, arguing that the record is now sufficiently developed for summary judgment on its declaratory judgment requests. In a sur-reply, filed December 17, 2013, Mr. Mann reasserted that Virginia Surety had waived certain coverage defenses and argued that Virginia Surety has misrepresented Judge DiMauro's earlier rulings.

Virginia Surety opposed Mr. Mann's cross-motion for summary judgment on January 10, 2014, asserting that its defenses remain valid and that the issue of prejudice should be decided by a jury. In his reply, filed January 21, 2014, Mr. Mann argued that Virginia Surety's defenses cannot succeed because of the undisputed facts in this case and an earlier ruling by the Vermont Supreme Court. He further claimed that Virginia Surety has not raised a genuine dispute as to whether it has suffered any prejudice.

DISCUSSION

To prevail on a motion for summary judgment, a movant must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment

[2] After initiating this action, Mr. Labrecque passed away and was replaced as a plaintiff by his estate.

as a matter of law." V.R.C.P. 56(a). In ruling on a motion for summary judgment, the court will take "all allegations made by the nonmoving party as true." *Richart v. Jackson*, 171 Vt. 94, 97 (2000). Here, two parties have moved for summary judgment, and each motion will be addressed separately. *See DeBartolo v. Underwriters at Lloyd's of London*, 2007 VT 31, ¶ 8, 181 Vt. 609 ("If both parties seek summary judgment, each must be given the benefit of all reasonable doubts and inferences when the opposing party's motion is being evaluated.").

In its motion, Virginia Surety seeks a declaratory judgment that (1) Plaintiffs must share in the aggregate $1,000,000 limit for Adventure Quest's 1994-1995 insurance policy and (2) any recovery must be limited to damages from injuries that actually occurred during the period of the 1994-1995 policy.

Virginia Surety's first request is denied. Mr. Mann disputes Virginia Surety's assertion that Plaintiffs' potential recovery is capped at $1,000,000. Specifically, he claims that a $2,000,000 limit is appropriate based on a prior ruling by Judge DiMauro and the express language of the Sexual Abuse Endorsement of the two insurance policies. Although the court will address Mr. Mann's cross-motion for summary judgment on this point below, the court believes that Mr. Mann has sufficiently disputed the issue of the recovery cap to make summary judgment in favor of Virginia Surety inappropriate. *See O'Brien v. Synnott*, 2013 VT 33, ¶ 9, 72 A.3d 331 (""A dispute over material facts precludes summary judgment.").

Virginia Surety's second request, however, is granted. Therefore, any recovery by Mr. Mann must be limited to damages from injuries that actually occurred during the period of the 1994-1995 policy or the 1995-1996 policy. In his cross-motion for summary judgment, Mr. Mann attempts to dispute when Mr. Drutchal's abuse took place by arguing that "Drutchal's abuse continued in the form of grooming, which consisted of sexual desensitization, coercion, intimidation, and threats to Scott Mann." Opp. to Pl.-In-Intervention Virginia Surety Company, Inc.'s Renewed Mot. for Partial Summ. J. and Cross-Mot. for Summ. J., p. 13. However, in the statement of undisputed material facts in support of his cross-motion, Mr. Mann states that "Dr. Joseph Hasazi testified during the *Scott Mann v. Adventure Quest, et al.* tort trial that grooming refers to a set of activities designed to make it easier for a sexual predator to commit an act of sexual abuse on a child." Scott Mann's Statement of Undisputed Material Facts in Support of Cross-Mot. for Summ. J. ("Mann's Statement"), ¶ 8. This fact, which Mr. Mann asserts is undisputed, demonstrates that grooming is not an act of sexual abuse in and of itself. It shows that grooming, which is the basis for Mr. Mann's abuse claim outside the period of the two insurance policies, is a different type of behavior. "In determining whether material facts are still in dispute, the court must find that the facts bearing on the issue are clear, undisputed, or unrefuted." *Cassani v. Hale*, 2010 VT 8, ¶ 20, 187 Vt. 336. Here, Mr. Mann's own statement of undisputed material facts make it clear that grooming is not sexual abuse and Mr. Drutchal's grooming does not implicate the insurance policies. Accordingly, Mr. Mann may recovery only for injuries that actually occurred during the period of the 1994-1995 policy or the 1995-1996 policy.

In his motion, Mr. Mann seeks four rulings: (1) a declaration that incidents of abuse that occurred after the expiration of the policies are covered; (2) a declaration that there is $2,000,000 in aggregate coverage; (3) a ruling that Adventure Quest did not have personal knowledge of Mr. Mann's abuse and is therefore an insured under the insurance policies; and (4) a ruling that there is insufficient evidence that Virginia Surety suffered prejudice because of its alleged late notice of Mr. Mann's claims against Adventure Quest. Each of Mr. Mann's requests must be denied.

First, Mr. Mann has failed to prove that the Sexual Abuse Endorsement establishes that incidents of abuse that occurred after the expiration of the policies are covered. "Insurance policies and their endorsements must be read together as one document and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *Fireman's Fund Ins. Co. v. CAN Ins. Co.*, 2004 VT 93, ¶ 20, 177 Vt. 215 (internal quotation omitted). Here, the 1994-1995 policy provides that "[t]his insurance applies to bodily injury and property damage only if... [t]he bodily injury or property damage occurs during the policy period." Mann's Statement, ¶ 25. The Sexual Abuse Endorsement provides that "[m]ultiple incidents of sexual abuse, sexual molestation, sexual exploitation, or sexual injury to one person shall be deemed to be one occurrence and shall be subject to the coverage and limits in effect at the time of the first incident even if some of such incidents take place after expiration of this policy." *Id.*, ¶ 31. The court finds that this language from the Sexual Abuse Endorsement does not explicitly overrule the 1994-1995 policy's temporal requirement. Accordingly, Mr. Mann is not entitled to a declaration that incidents of abuse that occurred after the expiration of the policies are covered.

Second, Mr. Mann has not demonstrated that, as a matter of law, there is $2,000,000 in aggregate coverage available. Mr. Mann argues that Judge DiMauro previously ruled that the maximum recovery for Plaintiffs would be $2,000,000 and that, accordingly, this ruling is now the law of the case. Mr. Mann overstates the effect of the law of the case doctrine, however. As the Supreme Court has explained "[t]he doctrine is only a rule of practice... which the court may disregard under the proper circumstances. Thus, a court ruling on an issue of law in the course of denying a motion for summary judgment retains the power to reopen what had previously been decided." *Gardner v. Jefferys*, 2005 VT 56, ¶ 14, 178 Vt. 594. In this case, Judge DiMauro mentioned in a single sentence of a detailed decision that Plaintiffs "are limited to a total maximum of $2,000,000 under the two policies to be shared between them." Decision Regarding: Defendant Adventure Quest, Inc. and Plaintiff-in-Intervention Virginia Surety, Inc.'s Joint Motion for Summary Judgment, p. 19. This sentence assumes that the 1994-1995 policy and the 1995-1996 policy would be implicated in an award to Plaintiffs. It was also dicta that was not central to Judge DiMauro's ruling. *See Pepin v. Allstate Ins. Co.*, 2004 VT 18, ¶ 16, 176 Vt. 307 (noting that dicta "is not binding authority"). Accordingly, considering that Judge DiMauro's statement regarding the maximum recovery available to Plaintiffs was dicta and that the law of the case doctrine is nothing more than a rule of practice, the court will not declare as a matter of law that there is $2,000,000 in aggregate coverage available to Mr. Mann.

Third, Mr. Mann is not entitled to a ruling that Adventure Quest lacked personal knowledge of Mr. Mann's abuse.[3] Whether Adventure Quest, the corporate entity, had personal knowledge of Mr. Drutchal's sexual abuse of Mr. Mann is a disputed question of material fact.[4] The parties dispute how much control Mr. Drutchal exercised over Adventure Quest and what roles other individuals played in the management of the company. "Summary judgment is improper where the evidence is subject to conflicting interpretations, regardless of a judge's perceptions of the comparative plausibility of facts offered by either party or the likelihood that a party might prevail at trial." *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15, 179 Vt. 545. Accordingly, the court will not grant summary judgment regarding whether Adventure Quest had personal knowledge of Mr. Drutchal's sexual abuse of Mr. Mann.

Fourth, the court will not grant summary judgment regarding whether there is insufficient evidence that Virginia Surety suffered prejudice because it allegedly received late notice of Mr. Mann's claims against Adventure Quest. Although this question could be resolved on summary judgment if the facts were clear, "the existence of prejudice to an insurer from a delayed notice is generally considered a question for the trier of fact." *Coop. Fire Ins. Ass'n of Vermont v. White Caps, Inc.*, 166 Vt. 355, 363 (1997). Here, exactly how Virginia Surety was prejudiced by allegedly receiving late notice of Mr. Mann's claims is disputed. Virginia Surety claims that if it had received proper notice of the claims, it could have responded to them, notified the proper authorities, and prevented further abuse. Mr. Mann asserts that Virginia Surety was provided with proper notice of the claims and that the company cannot prove that it suffered any prejudice. In considering a motion for summary judgment, the court's function is "not to make findings on disputed factual issues." *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 21, 180 Vt. 14. Therefore, the jury will determine whether Virginia Surety suffered any prejudice as a result of allegedly receiving late notice of Mr. Mann's claims of sexual abuse.

ORDER

Virginia Surety's Renewed Motion for Partial Summary Judgment is hereby GRANTED in part, and DENIED in part.

Mr. Mann's Cross-Motion for Summary Judgment is hereby DENIED.

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[3] This approach is consistent with the Supreme Court's analysis in its April 24, 2009 Decision. There, the Supreme Court explained that "[w]e cannot… determine from this record whether Drutchal controlled and dominated Adventure Quest. There are clearly disputed questions of material fact that prevent the grant of summary judgment. Although we agree with insurer that the question of whether Drutchal was the sole representative of Adventure Quest cannot be determined solely from the official roles and responsibilities of the actors in the corporation, these official roles and responsibilities are relevant, and we have virtually no evidence of the actual governance of Adventure Quest." *Mann v. Adventure Quest, Inc.*, 2009 VT 38, ¶ 17, 186 Vt. 14.

[4] If Adventure Quest did have such knowledge, it would not be an insured for the purposes of the insurance policies issued by Virginia Surety.

The clerk will set a status conference in the near future for trial scheduling purposes.

Dated at Woodstock, Vermont, this 26 day of February, 2014.

Honorable Harold E. Eaton, Jr.
Superior Court Judge