IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,	§	
Plaintiff,	§	CIVIL ACTION NO. 3:05-CV-1945-P
v.	§	
ROWLAND MANUFACTURING individually and d/b/a ROYAL DOOR CORPORATION, JAMES ROWLAND, JOHN C. ROWLAND, and OLEN DEVELOPMENT CORPORATION,	§	
Defendants.	§	

ORDER

Presently pending before the Court is The Rowland Defendants' Motion to Dismiss Plaintiff's Claim For Affirmative Reimbursement, filed October 27, 2005. Plaintiff filed a Response on November 16, 2005, and The Rowland Defendants filed a Reply on November 30, 2005. Plaintiff sought, and obtained, leave to file a Sur-Response, and such Sur-Response was filed December 15, 2005. After considering the parties' arguments and briefing, and the applicable law, the Court DENIES The Rowland Defendants' Motion to Dismiss Plaintiff's Claim For Affirmative Reimbursement.

I. Background

Defendants Rowland Manufacturing Corporation individually and d/b/a Royal Door Company, James Rowland, and John Rowland (collectively "Rowland Defendants") are insureds under a commercial general liability policy (hereinafter "Policy") issued by Plaintiff Indiana

Lumbermens Mutual Insurance Company (hereinafter "ILM"). The Rowland Defendants are currently defendants in at least four[1] separate lawsuits in Clark County, Nevada. (Compl. at ¶ 11.) Construction defects allegedly caused by the Rowland Defendants are substantially the basis of each action. (*Id.*) Under the terms of the Policy, ILM was called upon to defend and indemnify the Rowland Defendants in the Nevada litigation. ILM offered a qualified defense in each case and continues to represent the Rowland Defendants in the pending actions. On September 30, 2005, ILM filed a complaint in this Court, seeking (1) a declaration that it has no duty to defend or indemnify the Rowland Defendants, and (2) affirmative reimbursement for costs incurred in defending the Rowland Defendants, in accordance with *Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, --- S.W.3d ---- , 2005 WL 1252321 (Tex. May 27, 2005), *reh'g granted* (Jan. 6, 2006). The Rowland Defendants filed the instant partial motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the complaint fails to state a claim for relief, inasmuch as ILM is not entitled to affirmative reimbursement.

II. Legal Standard

Fed. R. Civ. Proc. 12(b)(6) ("Rule 12(b)(6)") provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. A motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted. *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997); *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Under the rule of *Conley v. Gibson*, 355 U.S. 41 (1957), a claim should not be dismissed

[1] ILM's complaint alleges that the Rowland Defendants have been sued in four separate actions, while their Response claims they are subject to five suits. But this inconsistency has no bearing on the issue before the Court.

unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. The Court must render its decision taking the complaint in the light most favorable to the plaintiff and taking its allegations as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). While the district court must accept as true all factual allegations in the complaint, it need not resolve unclear questions of law in favor of the plaintiff. *Kansa Reinsurance Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

The Court limits its inquiry to whether plaintiff is entitled to offer evidence to support its claims and does not address whether plaintiff will ultimately prevail on the merits. *Johnson v. Dallas Ind. School Dist.*, 38 F.3d 198, 199 (5th Cir. 1994). However, dismissal is proper when "even the most sympathetic reading of [the] pleadings uncovers no theory and no facts that would subject the present defendants to liability." *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

III. Analysis

In diversity cases, federal courts apply the substantive law of the forum state. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 78-79 (1938); *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990). Thus, the issue before the Court is whether ILM has stated a claim for relief under Texas law. In addition to its declaratory judgment cause of action, ILM seeks reimbursement for costs expended in defending the Rowland Defendants in the Nevada litigation to the extent that the lawsuits are based on underlying behavior that is not covered by the Policy. The Rowland Defendants claim that there is nothing in the Policy that allows for such

reimbursement and, in Texas, there is no implied right to affirmative reimbursement for defense costs. Thus, the Rowland Defendants argue that ILM's claim for affirmative reimbursement must be dismissed as it does not state a claim upon which relief can be granted.

ILM premises its claim for affirmative reimbursement on the Texas Supreme Court's recent holding in *Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, --- S.W.3d ---- , 2005 WL 1252321 (Tex. May 27, 2005), *reh'g granted* (Jan. 6, 2006). In *Frank's Casing*, the issue before the court was "whether excess insurance carriers that disputed coverage but settled third-party claims against their insured are entitled to recoup their settlement payments from their insured when it is subsequently determined that the claims against the insured were not covered." *Frank's Casing*, 2005 WL 1252321, at *1. The court found that, despite the absence of an express agreement allowing reimbursement, a quasi-contractual right of reimbursement could be implied at law and the insurer was entitled to recoup settlement payments for claims not covered by the policy. *Id.* at *5. In the same vein, ILM argues that a quasi-contractual right of reimbursement for defense costs exists, and that if the underlying events in the Nevada litigation are determined to be not covered by the Policy, ILM can recoup such expenditures.

The Rowland Defendants disagree, arguing that the holding in *Frank's Casing* was limited to reimbursement for settlement payments and the rationale would not apply to defense costs. The facts of the instant case are admittedly distinguishable from *Frank's Casing*. The present dispute involves reimbursement for defense costs; *Frank's Casing* dealt solely with reimbursement for settlement costs. The Texas Supreme Court has not held that an implied right of reimbursement for defense costs exists. However, the court of appeals in *Matagorda County v.*

Texas Ass'n of Counties County Gov't Risk Mgm't Pool, 975 S.W.2d 782, 784-85 (Tex. App.–Corpus Christi 1998), *aff'd*, 52 S.W.3d 128 (Tex. 2000) suggested that there was an implied right to reimbursement of litigation expenses in certain situations. The court cited several jurisdictions that recognized a right of reimbursement for defense costs and stated that they were consistent with Texas law.[2] *Id.* This holding has not been overruled, implicitly or otherwise. *See Texas Ass'n of Counties County Gov't Risk Mgm't Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000) (affirming the lower court's ruling on different grounds). Rather, subsequent case law such as *Frank's Casing* has bolstered the notion that a broader right to reimbursement may be implied under Texas law. 2005 WL 1252321, at *1 ("[W]e are persuaded that a right of recoupment can arise even absent an insured's express agreement to reimburse...").

Furthermore, at least two federal courts in the Fifth Circuit have likewise held that a cause of action for implied reimbursement of defense costs exists under Texas law. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.*, 249 F.3d 389, 391 n.3 (5th Cir. 2001) ("An insurance company may also reserve a right to recoup its costs of defense as long as the insurer specifically notifies the insured of its intent to collect the defense costs in a reservation of rights letter."); *Alliance Gen. Ins. Co. v. Club Hospitality, Inc.*, No. 3:97-CV-2448-H, 1999 WL 500229, at *1 (N.D. Tex. Jul. 14, 1999) ("Most, if not all, of the cases permitting an insurer to be reimbursed for the expenses it paid for the defense of the insured require the insurer to clearly

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[2] Specifically, the court cited *Buss v. Superior Court*, 939 P.2d 766, 776-78 & 784 n.27 (Cal. 1997), *Resure, Inc. v. Chemical Distributors, Inc.*, 927 F. Supp. 190, 194 (M.D. La. 1994), *aff'd*, 114 F.3d 1184 (5th Cir. 1997) (interpreting New Mexico law), and *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F. Supp. 1169, 1172 (D. Minn. 1996). While not determinative, it is persuasive to note that numerous additional jurisdictions have subsequently held that a right to reimbursement of defense costs exists. *See, e.g , United Nat. Ins Co. v SST Fitness Corp.*, 309 F.3d 914, 921 (6th Cir. 2002); *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090 (D. Nev. 1999); *Unionamerica Ins. Co. v. Gen. Star Indem. Co.*, No. A01-0317-CV, 2005 WL 757386, at *8 (D. Alaska 2005).

state that the carrier reserved its right to recover [defense costs] upon a judicial determination of no coverage."). In addition, a federal court in Minnesota was recently faced with the issue of "whether, in Texas, a liability insurer which has purported to reserve a right to reimbursement of defense costs may recover those costs, though the policy is silent on the matter, following a determination that the insurer had no duty to defend the underlying action." *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 377 F. Supp. 2d 719, 722 (D. Minn. 2005). When forced to decide the issue at the summary judgment stage, the court examined current case law and held that Texas courts have "suggested the possibility of reimbursement in an appropriate case." *Id.* (citing *Matagorda County*, 975 S.W.2d at 784-85.). The court found that *Frank's Casing* further validated their prediction that, in Texas, a quasi-contractual right to reimbursement may be implied in law. *Id.* at 724 (citing *Frank's Casing*, 2005 WL 1252321, at *5.).

Despite the Texas Supreme Court's silence on the precise issue at hand, this Court concludes that, under Texas law, an insurer has the implied right to recoup defense costs in certain circumstances. Thus, ILM has stated a claim upon which relief may be granted. The Rowland Defendants have not convinced the Court "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

Lastly, the Rowland Defendants argue that, even if a right of reimbursement is found, ILM failed to sufficiently reserve its right to reimbursement. The predicate for reimbursement appears to be a reservation of rights by the insurer that fairly notifies the insured of its intention to seek reimbursement for defense costs. *Green Tree*, 249 F.3d at 391 n.3; *Alliance Gen. Ins.*, 1999 WL 500229, at *1. But viewing the complaint in the light most favorable to the plaintiff, as

the Court must, ILM did reserve its right to seek reimbursement of defense costs. (Compl. ¶ 11.) Resolving all factual disputes in favor of the plaintiff, the Court finds that ILM has stated a valid claim for relief under Texas law, such that dismissal under Rule 12(b)(6) is inappropriate. Defendants seek dismissal of Plaintiff's claim for reimbursement of sums paid out in settlement and satisfaction of the Nevada litigation. Defendants assert that, to date, no indemnification payments have been made. Although Plaintiff does not specifically respond to this portion of Defendants' motion, the Court declines to dismiss that portion of Plaintiff's claim at this stage.

IV. Conclusion

For the foregoing reasons, the Court DENIES The Rowland Defendants' Motion to Dismiss Plaintiff's Claim For Affirmative Reimbursement.

IT IS SO ORDERED.

Signed this 25th day of January 2006.

Jorge A. Solis

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE