IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

National Casualty Company,

Plaintiff,

v.

Fulton County, Georgia,

Defendant.

_____/

Case No. 1:16-cv-00679

Michael L. Brown
United States District Judge

ORDER

In March 2018, Judge Duffey granted Plaintiff National Casualty Company's Motion for Summary Judgment. Defendant Fulton County moved for reconsideration. After careful consideration, the Court denies the motion.

I. Background

Between 2010 and 2015, seven Fulton County employees sued the County claiming it had not paid them according to its own personnel regulations. (Dkt. 35-2 ¶ 41.) The parties refer to these cases collectively as the Pay Parity cases and individually by each of the lead plaintiff's

last name: Lord, Andrews, Manchel, DeFoor, Bigelow, Allen, Benson, and Chouhan. (*Id.* ¶ 41; Dkt. 36-1 ¶ 20.) In 2013 and 2014, Fulton County had insurance policies with National Casualty that included "employment practices wrongful act" coverage. (Dkt. 35-2 ¶¶ 1–2.) The policies required Fulton County to notify National of any potential liability "as soon as practicable." (Dkt. 1-2 at 5.)

The County communicated with its insurers through the Willis Group, which acted as the County's broker when it applied for the policies. (Dkt. 36-1 ¶ 29.) National used Civic Risk Underwriting Managers ("Civic Risk") as its underwriter for the relevant policies. So, the County applied for these policies by having the Willis Group submit applications to Civic Risk. (Dkt. 35-2 ¶ 14–16.) As a part of the applications, Fulton County (through the Willis Group) gave Civic Risk reports known as loss runs. (*Id.* ¶¶ 19–23.) These are lists of claims made/paid that give the underwriter information about an applicant's claim history. (*Id.* ¶ 20.) The parties refer to the relevant loss runs as the "Internal Runs." The Internal Runs that Fulton County gave to Civic Risk identified the Allen, Andrews, Bigelow, DeFoor, and Manchel claims

— but not the Benson or Chouhan claims. (Dkts. 34-8 at 4; 34-16 at 11–12, 14, 37, 40; 34-18 at 3–5.)

Civic Risk was at least somewhat aware of the Internal Runs. Its underwriter for the 2014 policy reviewed her files for the Pay Parity cases, noticed these cases were there, but "did not feel a concern about them at that time." (Dkt. 35-2 ¶ 26.) The underwriter also reviewed the Internal Runs for other pay disparity claims and saw that "some were there." (*Id.* at ¶ 33.) A document titled "Civic Risk Rating Workbook" listed several of the Pay Parity cases. (*Id.* ¶ 34.) After a brief description of the claims, the Workbook notes that "Ken Scroggins feels that coverage should potentially be found under our Policy." (*Id.*) Ken Scroggins was a manager in National's claim department. (*Id.*)

Two County offices were responsible for handling the County's defense to the Pay Parity cases. First, the County Attorney's Office defended the County in the litigation. (Dkt. 36-1 ¶¶ 26–27.) Second, the Risk Management Department was responsible for notifying the County's insurers of the cases. (*Id.*) The County did this through the Willis Group. (*Id.* ¶ 29.)

The county official responsible for reporting the relevant liability sent the Willis Group a series of memoranda outlining risk from the Pay Parity cases. (*Id.* at 31–36.) The undisputed facts show that the Willis Group notified National of the Benson grievance on March 9, 2015. (*Id.* ¶ 55.) The undisputed evidence also shows the County reported the Andrews, Allen, Bigelow, DeFoor, Lord, and Manchel matters to National on July 27, 2015. (*Id.* ¶ 57.)

In August 2015, National denied coverage for all the cases. (*Id.* ¶¶ 51–53.) When offered, National refused to participate in the mediation between Fulton County and the different sets of Plaintiffs. (*Id.*) National then sued for declaratory judgment on whether the policy provided coverage and if the County had provided adequate notice. (*See* Dkt. 1). After discovery, both parties moved for summary judgment. (Dkts. 35, 36.) The Court granted summary judgment to National, finding that coverage existed, but that the County had not given adequate notice. (Dkt. 51.)

In its order, the Court first analyzed whether the policy's notice provisions were ambiguous. The policy has three different provisions,

and the Court found "these provisions are consistent and not ambiguous, including because each contains a different trigger." (*Id.* at 40.)

The Court analyzed whether the County gave notice to National, noting that the parties disagreed on what constituted adequate notice. (*Id.* at 42.) The Court reasoned that the policy provided instructions for how to give notice in the provision "How to Report a Claim," and that National had not received notice until between eleven and twenty-four months from when each case was filed. (*Id.* at 41–42, 49.) The policy provided that the County should let National know "as soon as practicable" of potential liability. (Dkt. 1-2 at 5.) The Court found these timelines did not meet this standard, and the County does not challenge this finding on any lawsuit except Chouhan. (Dkt. 51 at 46–49.) The Court also found the Internal Runs the County provided Civic Risk did not constitute adequate notice. (*Id.* at 43–46.) The County's Motion for Reconsideration in large part challenges this conclusion.

II. Standard

Because of the interest in finality, courts discourage motions for reconsideration. Under Local Rule 7.2(E), motions for reconsideration "shall not be filed as a matter of routine practice," LR 7.2E, NDGa., and

should only be brought when "absolutely necessary." *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258 (N.D. Ga. 2003). "Reconsideration is only 'absolutely necessary' where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *Id.* For the third factor, a clear error consists of a manifest error of law or fact "made despite a clear presentation of the issue by the party seeking reconsideration." *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 678 (N.D. Ga. 1993), *on reconsideration* (Dec. 14, 1993).

Movants should not bring motions for reconsideration to show the court how "it could have been done better"; to "present the court with arguments already heard and dismissed"; or to test new legal theories movants could have initially brought. *See Bryan*, 246 F. Supp. at 1259 (internal quotations and citation omitted). The court will deny motions for reconsideration brought under these circumstances. With these principles in mind, the Court addresses Defendant's Motion for Reconsideration.

III. Analysis

The County asserts the Court made clear error in its summary judgment order in six ways. The County argues (1) it gave National's agent notice; (2) National had actual notice of the lawsuits; (3) National had sufficient information to investigate the claims, all that is required under Georgia law; (4) the Court treated the Pay Parity Claims summarily even though some claims had earlier notice than others; (5) the notice provisions in the policy were ambiguous; and (6) the County gave timely notice in the Chouhan claim. The Court addresses each claim in turn.

A. Notice to Civic Risk

The County argues National in fact had notice because its agent, Civic Risk, had notice. *See* GA. CODE ANN. § 10-6-58 ("Notice to the agent of any matter connected with his agency shall be notice to the principal."). The County supports this argument with a statement by National's 30(b)(6) witness, who said in his deposition, "if an insured sent notice of a claim to Civic Risk, it is the same thing as sending it to National Casualty." (Dkt. 34-3 at 22:15–16.)

This argument fails. Although proper notice to an agent can satisfy the notice requirement, the Court found the Internal Runs did not constitute adequate notice, and this finding was not clear error. The Court made this finding for three reasons. First, the Court found the Internal Runs were not adequate notice because they did "not properly apprise National of the facts of the claims in order to participate in their defense, as contemplated by the policies." (Dkt. 51 at 44.) Second, the Court found that other policies elect to have loss runs constitute notice, and this policy did not. (*Id.* at 45 (citing *Evanston Ins. Co. v. Centennial Healthcare Corp.*, No. 1:05-CV-2012, 2007 WL 2071533, at *5 (N.D. Ga. July 12, 2007)).) Third, the Court found that the County did not intend to give National notice through the Internal Runs, as the runs "were intended to provide historical information for the purpose of the underwriter's evaluation of past claims to assess future risk, not to apprise National of claims in the future." (*Id.* at 45.)

The Court buttressed this finding with persuasive case law that holds that loss runs do not constitute notice. (*Id.* at 46 (citing *Steadfast Ins. Co. v. Sentinel Real Estate Corp.*, 727 N.Y.S.2d 393, 400 (N.Y. App. Div. 2001) and *Ins. Co. of Penn. v. City of San Diego*, No. 02-CV-0693

BEN (CAB), 2008 WL 11338593, at *3 (S.D. Cal. Mar. 14, 2008)).) The County has presented no authority suggesting this reasoning was wrong, let alone clear error. The County argues that National's 30(b)(6) witness admitted that National received notice, but National's witness made no such admission. The witness said notice to Civic Risk would be notice to National, not that the County sent Civic Risk proper notice. The Internal Runs were not formal notice, and thus the County's argument fails.

B. Actual Notice

The County argues the Court made a clear error because Ken Scroggins, National's claims manager at the time, had actual notice of the Pay Parity Claims. The County cites, for instance, the Civic Risk Rating Workbook, which stated "Ken Scroggins feels that coverage could potentially be found under our policy." (Dkt. 34-25 at 2.) The Court's order considered these facts but found that Scroggins's knowledge did not meet the notice requirement.

Although the order did not explicitly discuss actual knowledge, the Court outlined the Policies' requirements for formal notice and the rationale behind those requirements. In its discussion of whether the Internal Runs constituted notice, the Court wrote "the Policies

contemplate that the County will provide detailed information about a reported claim." (Dkt. 51 at 45.) National needed this detailed information "to investigate promptly the facts surrounding the claims while they are still fresh and the witnesses are still available, and to prepare for a defense or settlement of the action." (*Id.* at 44–45 (citing *Owners Ins. Co. v. Gordon*, 315 F. App'x 146, 148 (11th Cir. 2008)).)

Put differently, the policies explained the requirements of notice, specifically in the provisions on "Claim Reporting Information," "How to Report a Claim," and "Item 5 Report Claim or Suit To." (Dkts. 1-1 at 5–6, 20; 1-2 at 5–6, 20.) The County did not follow the instructions outlined in these provisions until the Willis Group sent correspondence between eleven and twenty-four months after the cases were filed. The Court found that Ken Scroggins's knowledge of some claims did not constitute formal notice, and the County cites no authority suggesting this finding was clearly erroneous.

The County argues that the insurance company has the burden to show it did not have notice. *See Burton v. Nat'l Indem. Co.*, 181 S.E.2d 107, 110 (Ga. App. 1971) (holding "burden was upon the defendant insurance company to prove its affirmative defense . . . that it had not

received notice"). Even so, upon reviewing the record, the Court determined National had met that burden. The Court dismisses this argument.

C. Amount of Information

In finding the Internal Runs did not constitute adequate notice, the Court reasoned that the Internal Runs did not provide sufficient information to constitute notice. The County argues this finding was clear error because missing information does not render notice insufficient. *Titan Indem. Co. v. Hall Cty.*, 413 S.E.2d 213, 215 (Ga. Ct. App. 1991) ("As is true generally with regard to issues relating to reasonableness and sufficiency of compliance with stated conditions, question of the adequacy of the notice . . . are ones of fact which must be resolved by a jury as they are not susceptible to being summarily adjudicated as a matter of law."). The County asserts National had sufficient information to investigate and the claims reporting requirements require no specific details.

The Court implicitly rejected the County's argument when reasoning on the purpose of the Internal Runs. The Court wrote: "The Internal Runs were intended to provide historical information for the

purpose of the underwriter's evaluation of past claims to assess future risk, not to apprise National of claims in the future." (Dkt. 51 at 45.) In other words, whatever information National had did not warn it of future liability, and the County did not submit the Internal Runs to report a claim. *See Pub. Nat'l Ins. Co. v. Wheat*, 112 S.E.2d 194, 198 (Ga. Ct. App. 1959) ("The purpose of notice is to enable the insurer to inform itself promptly concerning the accident, so that it may investigate the circumstances, prepare for a defense, if necessary, or be advised whether it is prudent to settle any claim arising therefrom."). This finding was not clear error.

D. Lack of Notice of Some Claims Does Not Negate Notice of Other Claims

The County argues that, even if some claims lacked notice, other claims had adequate notice, and the Court made clear error by treating the claims summarily. The Court, however, did not treat the claims summarily. The Court made a chart outlining when Fulton made formal notice for each claim, finding that the timeline between when each claim was filed and when the County gave notice to stretch between eleven and twenty-four months. (*See* Dkt. 51 at 49.)

The Court also noted that the Internal Runs do not mention every claim, but this would only matter "if notice to Civic Risk was sufficient to put National on Notice." (*Id.* at 44.) But the Court found that the Internal Runs could not put National on notice, making which claims were included in the Internal Runs irrelevant. (*See id.* at 44–46.) The Court thus dismisses this argument.

E. The Claims Reporting Requirements Certification

The County argues the Court made clear error when it concluded the claims reporting requirements were unambiguous. The policy has three claims reporting requirements and the County argues that the second and third provisions conflict. The second reporting requirement states that "if a claim is made against the insured the County must notify National as soon as practicable." (Dkt. 1-1 at 20.) The third reporting requirement requires "written notice as soon as practicable" of "Special Serious Claims," which include all employment practice wrongful acts or claims in which the County's exposure, in its or its counsel's judgment, "exceeds or may exceed fifty percent (50%) of the 'retained limit'; [or] . . . [a]ny demand or demands that equal or exceed fifty percent (50%) of the 'retained limit.' " (*Id.*)

The Court found that these provisions were not ambiguous because they each contained a different trigger. Upon reconsideration, the difference between these two reporting requirements is that one of them requires written notice and the other one does not: all claims require notice "as soon as practicable"; special serious claims require written notice "as soon as practicable." This distinction is not ambiguous. The Court thus dismisses this claim.

F. Notice of Chouhan

The County argues the Court made clear error when it determined that there was a question of fact over whether the Chouhan grievance was untimely. The Court found that Fulton reported Chouhan to National on August 4, 2015, which was a week after the grievance was filed. Although it is likely that this claim would be timely, this issue is moot. *See Green v. Grayer*, No. CIVA 1:09CV473TWT, 2010 WL 398112, at *1 (N.D. Ga. Jan. 25, 2010) ("Any case, or issue within a case, that has lost its character as a present, live controversy is moot.") (internal citations and quotation marks omitted). The County informed National that it settled the Chouhan grievance for $945,985.17, which is below the policy's retained limit of $2,000,000.00. The County agrees with this

conclusion and finds "if the court is not inclined to reconsider its summary judgment ruling regarding notice of the Pay Parity Lawsuits, the Court should enter final judgment." (Dkt. 55 at 2.) Since the Court refuses to reconsider its summary judgment ruling, the Court dismisses this claim.

IV. Conclusion

The Court **DENIES** Defendant Fulton County's Motion for Reconsideration (Dkt. 52).

SO ORDERED this 19th day of June, 2019.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE