UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-cv-08549-SVW-SK	Date	February 22, 2017
Title	The Casiano-Bel Air Homeowners Association v. Philadelphia Indemnity Insurance		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
N/A	N/A

Proceedings: IN CHAMBERS ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY CLAIMS [11].

I. INTRODUCTION

On November 16, 2016, Plaintiff Casiano-Bel Air Homeowners Association ("Plaintiff") filed its Complaint in this Court for declaratory relief, breach of *Cumis* Statute (Cal. Civ. Code §2860), breach of contract, and breach of the duty of good faith and fair dealing against Defendant Philadelphia Indemnity Insurance Company ("Defendant"). Dkt. 1. On December 14, 2016, Defendant filed the instant Motion to Compel Arbitration and to Stay Claims. Dkt. 11.

II. FACTUAL BACKGROUND

A. OVERVIEW

Defendant is an insurance company that provides general liability insurance policies for Plaintiff. Dkt. 1, p. 1. Plaintiff is a non-profit homeowner's association that manages property in West Los Angeles. Dkt. 1, p. 1; Dkt. 15, p. 2.

This action arises out of a series of insurance policy agreements where Defendant agreed to provide insurance for Plaintiff. Dkt. 15, p. 3. Each insurance policy agreement covered one year, and Plaintiff renewed the insurance policy agreement on an annual basis. Dkt. 15, p. 3. The parties disagree on whether there are thirteen or fourteen insurance policy agreements, but the exact number is not relevant to the current inquiry. Dkt. 11, p. 2; Dkt. 15, p. 3. What is relevant is that the parties agree that

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every insurance policy agreements except the first one issued contains a binding arbitration provision requiring the arbitration of all disputes regarding coverage. Dkt. 11, p. 12; Dkt. 15, p. 3-4. In August 2010, a third-party claim was brought by David Moradzadeh against Plaintiff. Dkt. 15, p. 4. Plaintiff tendered the defense of the lawsuit to Defendant. Dkt. 1, p. 5. Defendant assumed a defense on behalf of Plaintiff and provided Plaintiff with representation from the Lee Law Group, PC, subject to a full reservation of rights. Dkt. 1, p. 4. Plaintiff then demanded independent *Cumis* counsel, alleging that Defendant had a conflict of interest because a victory in the Moradzadeh litigation would impact whether the claim was covered under the insurance policy. Defendant denied Plaintiff's request for independent *Cumis* counsel. Dkt. 1, p. 5-6.

Plaintiff filed a complaint against Defendant in this Court in response. Dkt. 1. Defendant answered with the instant Motion to Compel Arbitration and Stay Claims based on the arbitration provisions contained in the insurance policy agreements. Dkt. 11.

B. THE INSURANCE POLICY AGREEMENTS AND ARBITRATION CLAUSES

The insurance policy agreements between Plaintiff and Defendant cover "bodily injury," "property damage," and "personal and advertising injury," and provides the right and duty to defend the insured against any suit seeking damages relating to such claims. Dkt. 11, p. 2. The policies include a subsidence exclusion which states that the coverage does not apply to those otherwise-covered injuries if they are "caused by, resulting from, attributable or contributed to, or aggravated by the subsidence of land as a result of landslide, mudflow, earth sinking or shifting, resulting from the operations of the named insured or any subcontractor of the named insured." Dkt. 1, p. 3. "Subsidence" refers to the movement of the ground to a lower level.

Each annual insurance policy agreement Defendant issued to Plaintiff except for the first one contains an arbitration provision titled "Binding Arbitration," requiring arbitration of all disputes regarding coverage. The provision provides in relevant part:

> "If we and the insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration. When this demand is made, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will: 1. Pay the expenses it incurs; and 2. Bear the expenses of the third arbitrator equally. Unless both parties agree otherwise, arbitration will take place in the county or parish in which the address shown in the Declarations is located. Local

rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding." Dkt. 11, p. 8.

C. UNDERLYING MORADZADEH LITIGATION

The underlying litigation giving rise to this claim was brought by David Moradzadeh in Moradzadeh v. Casiano-Bel Air Homeworners Association, et. al. Dkt. 11, p. 1. Moradzadeh bought a home within the governance of Casiano-Bel Air Homeowners Association. Dkt. 1, p. 3. Moradzadeh claimed that the Homeowners Association breached its obligations to maintain certain slopes adjacent to Moradzadeh's property and as a result, Moradzadeh suffered damages. Dkt. 11, p. 1. Moradzadeh's original complaint consisted of losses caused as a result of subsidence. Id.

Casiano-Bel Air Homeowners Association tendered Moradzadeh's claim to Philadelphia Indemnity Insurance Company. Dkt. 1, p. 4. Philadelphia Indemnity Insurance Company initially denied providing a defense based on the subsidence exclusion. Dkt. 11, p. 3-4. In May 2016, the pleadings in the Moradzadeh litigation were amended to suggest non-slope-related damages which would avoid the subsidence exclusion. Dkt. 11, p. 4. Philadelphia Indemnity Insurance Company then appointed the Lee Law Group PC as counsel to defend Casiano-Bel Air Homeowners Association, while reserving the right to deny coverage later. Dkt. 1, p. 4-5.

D. DEMAND FOR *CUMIS* COUNSEL

Plaintiff demands that Defendant provide independent *Cumis* counsel to Plaintiff, because Defendant's reservation of rights allegedly created a conflict of interest. Dkt. 1, p. 5. Plaintiff argues that the decision in the Moradzadeh litigation may influence subsequent coverage determinations, and therefore a conflict of interest exists which gives rise to Plaintiff's right to independent *Cumis* counsel.[1] Dkt. 1, p. 5-6. Therefore, Plaintiff concludes that Defendant has a conflict regarding the presentation of evidence and arguments surrounding whether Plaintiff was responsible for the change in earth subsidence. Id. Defendant has rejected Plaintiff's demand for independent *Cumis* counsel. Dkt. 11, p. 9.

Meanwhile, Plaintiff's other insurer, Travelers Casualty and Surety Company of America, appointed Skiermont Derby LLC to serve as counsel for Plaintiff. Dkt. 1, p. 6-7. Skiermont Derby, LLC

[1] Claims in the Moradzadeh litigation involve questions of which party caused or contributed to the earth subsidence adjacent to Moradzadeh's property; this determination may also be a key issue in determining whether the incident is covered under the insurance policy agreement. Dkt. 1, p. 4-5.

represents Plaintiff in the current action filed with this Court and is also Plaintiff's counsel-of-choice to serve as its *Cumis* counsel. Dkt. 1, p. 6-7.

Plaintiff filed this lawsuit with the court alleging that Defendant's refusal to provide independent *Cumis* counsel to Plaintiff constitutes a breach of the *Cumis* statute, a breach of contract, and a breach of the implied covenant of good faith and fair dealing. Dkt. 1, p. 8-14. Plaintiff seeks (a) declaratory relief that (i) Plaintiff is entitled to independent *Cumis* counsel of its choosing, to be paid for by Defendant, (ii) Plaintiff and its *Cumis* counsel have the right to control the defense of the Moradzadeh litigation and (iii) Plaintiff is entitled to attorney's fees and expenses incurred in the Moradzadeh litigation during the period prior to Defendant accepting the tender in May 2016, with interest, (b) a judgment in the amount of the attorney's fees and expenses incurred in the Moradzadeh litigation during the period prior to Philadelphia accepting the tender in May 2016, with interest, (c) compensatory damages in an amount subject to proof at trial, and (d) punitive damages for the breach of the implied covenant of good faith and fair dealing. Dkt. 1, pg. 14-15.

III. DISCUSSION

A. ARBITRABILITY

The Federal Arbitration Act (FAA) instructs that "[a]rbitration clauses are to be liberally construed, and any doubts about the scope of an arbitration clause are to be resolved in favor of arbitration." ATSA of Cal., Inc. v. Cont'l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960)). In determining the applicability of an arbitration agreement, the Court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Chiron Corp. v. Orth Diagnostic System, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000); see also Winery, Distillery & Allied Workers Union, Local 186 v. E & J Gallo Winery, Inc., 857 F.2d 1353, 1358 (9th Cir. 2000).

1. A VALID AGREEMENT TO ARBITRATE EXISTS

In deciding whether a valid arbitration agreement exists, the Court applies governing state law. Here, California law applies. See First Options v. Kaplan, 514 U.S. 938, 944 (1995); accord Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1217 (9th Cir. 2008) ("We apply state-law principles that govern the formation of contracts to determine whether a valid arbitration agreement exists."). In making this

determination, "as with any contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1139 (9th Cir. 1991) (citing Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

a. The arbitration clause is not unenforceable for unconscionability

Plaintiff argues that the arbitration clause is substantively unconscionable because it is one-sided. Dkt. 15, p. 7. Substantive unconscionability may be found when terms are "overly harsh," "one-sided," without justification as evaluated at the time the contract was made, and are typically so unreasonable as to "shock the conscience". Witkin Summary of California Law, 10th Edition, Contracts §332; American Software, Inc. v. Ali, 46 Cal.App.4th 1386, 1390–94.

Plaintiff also argues that the arbitration clause is procedurally unconscionable because it is adhesive and was included without notice. Dkt. 15, p. 6. Procedural unconscionability focuses on whether there is (1) "oppression" arising from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice, and (2) "surprise" which involves the extent the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. Witkin Summary of California Law, 10th Edition, Contracts §332. As far as the "oppression" factor goes, "[i]n many cases of adhesion contracts, the weaker party lacks not only the opportunity to bargain but also *any realistic opportunity to look elsewhere for a more favorable contract;* he must either adhere to the standardized agreement *or forego the needed service.*" Parada v. Superior Court, 176 Cal.App.4th 1554, 1572 (2009) (emphasis in original). Conversely, "the 'oppression' factor of the procedural element of unconscionability may be defeated if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable.'" Id. at 1573.

The Court finds that the arbitration provision used in Defendant's policies is neither substantively nor procedurally unconscionable. Substantively, it is not one-sided because it grants both parties the right to demand arbitration under the relevant circumstances. The arbitration clause does not shock the Court's conscience, as its terms appear similar to standard and common form language for arbitration. Procedurally, it is not oppressive because Plaintiff provides no evidence that it did not have the ability to reject the insurance contract offered by Defendant and seek coverage from a range of other insurance companies. Further, the element of surprise that Plaintiff claims stems from the addition of the arbitration provision in renewed policies does not meet the high hurdle of procedural unconscionability because Plaintiff was sent a conditional-renewal notice listing proposed additions and deletions to the

policy before the previous policy's expiration, thereby providing Plaintiff an opportunity to decline to renew given the new terms. Dkt. 15, p. 10. Plaintiff also had copies of its policies that included the arbitration provision for over a decade during which Plaintiff had the opportunity to read the provision. As a result, the Court holds that the arbitration clause is not unenforceable due to unconscionability.

b. The arbitration clause is mandatory, not permissive

The Court holds that the arbitration clause is neither permissive nor ambiguous in the manner Plaintiff claims. Dkt. 15, p. 4. The arbitration clause's use of the word "may" refers to the parties' option to demand arbitration. The use of the term "may" (rather than "shall") in this manner does not convert the subsequent arbitration requirement from mandatory to permissive. Instead, once a demand is made, the arbitration clause becomes mandatory. It is the choice to demand that is permissive, not the arbitration following the demand. The arbitration clause would be meaningless if it was interpreted as permissive, because parties may always arbitrate their disputes if both parties consent. Because Defendant exercised its option to demand arbitration and the language of the arbitration clause clearly dictates the next steps to be taken, the arbitration clause unambiguously directs mandatory arbitration.

2. THE ARBITRATION AGREEMENT ENCOMPASSES THE DISPUTE AT ISSUE

Any inquiry into the scope of an arbitration clause begins with a presumption in favor of arbitrability. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960). "In the absence of any express provision excluding a particular grievance from arbitration …only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where … the exclusion clause is vague and the arbitration clause quite broad." Id. at 585. "[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" AT & T Techs. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (quoting United Steelworkers of America, 475 U.S. at 649).

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a. The scope of the arbitration clause includes this dispute

Plaintiff argues that the parties' *Cumis* counsel disagreements fall outside of the scope of disagreements to which the arbitration clause applies. The arbitration clause provides that either party may make a written demand for arbitration if disagreements arise as to "whether coverage is provided." Dkt. 15, p. 4. Plaintiff argues that, in their disagreements about *Cumis* counsel, "[t]he parties do not dispute *whether* coverage is provided, they dispute *the manner in which the coverage has been provided,*" and further argues that the difference determinatively puts the issues outside of the scope of the arbitration clause. Dkt. 15, p. 11, 12-14. Plaintiff further claims that Defendant already ceded the question of coverage when it assumed the defense on behalf of Plaintiff, making the arbitration provision inapplicable. Dkt. 15, p. 11-12.

The Court rejects Plaintiff's arguments and finds that the parties' *Cumis* counsel disagreements fall within the scope of the arbitration clause. Plaintiff's claims merely need to "touch matters" covered by the arbitration clause to fall under it, and doubts are to be resolved in favor of arbitrability. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 624 n.13 (1985) ("the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability"); Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

At their heart, Plaintiff's claims are about its rights to and cost of its *Cumis* defense counsel. "*Cumis* counsel is counsel selected by the insured to represent its interest and paid for by the insurer in a conflict of interest situation." Employers Ins. of Wausau v. Albert D. Seeno Const. Co., 945 F.2d 284 (9th Cir. 1991). Specifically, Plaintiff seeks for Defendant to accede that Plaintiff has a right to *Cumis* counsel such that Plaintiff's current counsel-of-choice, Skiermont Derby LLC (the law firm that filed the present action), gets to control the Moradzadeh litigation and be paid for by Defendant. Clearly then, *Cumis* counsel is an aspect of the duty to defend. The term "coverage" which includes both the duty to defend and the duty to indemnify,[2] so Plaintiff's *Cumis* counsel issues are included as part of the

[2] Courts have interpreted the term "coverage" in this manner, and the "Coverages" section of Defendant's insurance policy agreement specifies both indemnity and defense duties. Within the insurance policy agreement just under the heading "SECTION I – COVERAGES", it reads "We [the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages." Dkt. 11, p. 9. This language suggests that the parties understood coverage to include both indemnity and defense issues.

broader category of "coverage." Therefore, the issues of whether *Cumis* counsel is provided and paid for by Defendant "touch[es] matters" of whether coverage is provided, and thus fall within the scope of the arbitration provision.

This conclusion holds true even if the Court accepts Plaintiff's contention that the right to *Cumis* counsel is an issue of "the manner in which the coverage has been provided." Plaintiff provides no colorable reason nor cites any relevant authority for believing that there is a determinative distinction that would lead the Court to find that "the manner in which coverage has been provided" does not "touch matters" of "whether coverage is provided."

Plaintiff tries to bolster its argument by suggesting that Defendant ceded the question of coverage when it assumed the defense on behalf of Plaintiff by appointing the Lee Law Group PC, thus making the arbitration clause no longer applicable. Dkt. 15, p. 11-12. This argument is not persuasive to the Court because it improperly suggests that by assuming Plaintiff's defense (a narrow part of coverage, which includes both defense and indemnity), Defendant has ceded the broader category of coverage. Further, Defendant assumed Plaintiff's defense under a reservation of rights. This means the insurance company assumes a defense while not conceding coverage and indeed reserving the right to deny coverage and/or a defense under the policy at a later time if it is determined there is no coverage.[3] The reservation of rights further demonstrates that Defendant has not ceded the issue of coverage. Instead, the parties dispute coverage-related issues in the instant motion. Therefore, the Court holds that Plaintiff's claims are within the scope of the arbitration clause.

Moreover, courts have previously found the term "coverage" to refer to both indemnity and defense issues. Nationwide Mut. Ins. Co. v. Lowe, 95 F.Supp.2d 274, 275-276 fn. 1 (E.D. Pa. 2000) (observing that "[u]nder the insurance policy, coverage includes the duty to defend and indemnify"); Liberty Mutual Ins. Co. v. Mustang Tractor & Equip. Co., 812 S.W.2d 663, 667 (Tex. App. 1991) (recognizing that the phrase "denial of coverage … encompasses the duty to defend under a common understanding of the term 'coverage.'"); Washington v. State Farm Fire & Cas. Co., 629 A.2d 24, 27-28 (D.C.App. 1993) (finding it "reasonable to conclude that the term 'coverage' includes the duty to defend as well as the duty to indemnify, since these are the operative risks against which the policy is designed to protect.").

[3] See, e.g., Buss v. Superior Court, 16 Cal.4th 35 (where the insurance company "reserved all its rights, including to deny that any cause of action was actually covered, and, '[w]ith respect to defense costs incurred or to be incurred in the future, ... to be reimbursed and/or [to obtain] an allocation of attorney's fees and expenses in this action if it is determined that there is no coverage....'"); see Blue Ridge Ins. Co. v. Jacobson, 25 Cal.4th 489 (holding that an insurer may agree to defend a suit subject to a reservation of rights and thus meet its obligation to furnish a defense without waiving its right to assert coverage defenses against the insured at a later time).

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b. The right to *Cumis* counsel is not a subject matter barred from arbitration

Plaintiff further contends that this dispute should not be sent to arbitration because "the fundamental question of the right to *Cumis* counsel is not arbitrable" and that it constitutes an error for the trial court to authorize arbitration concerning threshold issues on the necessity for *Cumis* counsel. Dkt. 15, p. 15. Plaintiff incorrectly states the law on both fronts.

Plaintiff cites cases where appellate courts found that trial courts erred in authorizing an arbitrator to determine the necessity of *Cumis* counsel. However, Plaintiff failed to note that these cases dealt with completely different fact patterns that render them inapplicable here. For instance, in one case a California appeals court found that the issue of determining the necessity of *Cumis* counsel does not fall under the mandatory arbitration language of California Civil Code § 2860(c), which mandates that disputes over independent *Cumis* counsel's fees be resolved by arbitration.[4] Handy v. First Interstate Bank, 13 Cal. App. 4th 917, 924 (1993); California Civil Code § 2860(c) ("Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute"). The Handy dispute centered on the proper application of § 2860(c), while the present case involves the terms of a private arbitration agreement and does not rely on the provisions of § 2860(c) at all. Thus, Handy is not applicable.

Furthermore, the California Court of Appeal has explicitly acknowledged that "parties may broaden the scope of arbitration by agreement." Gray Cary, 114 Cal. App. 4th at 478-79. Plaintiff and Defendant broadened the scope of mandatory arbitration by agreement through the arbitration clause in the insurance policy agreements. Thus, the Court rejects Plaintiff's argument that its *Cumis* counsel issues are categorically banned from being sent to arbitration.

B. STAY OF THIS ACTION PENDING ARBITRATION

Section 3 of the Federal Arbitration Act provides that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in

[4] The Court acknowledges that this statutory mandatory arbitration requirement under §2860(c) applies only to disputes that are limited to the amount of legal fees or the hourly billing rates, or issues that bore "directly on the amount of legal fees owed." Arrowood Indem. Co. v. Bel Air Mart, 2013 U.S. Dist. LEXIS 78535, *5-13 (E.D. Cal., June 4, 2013); see, e.g., Gray Cary Ware & Freidenrich v. Vigilant Ins. Co., 114 Cal. App. 4th 1185, 1192 (2004); Fireman's Fund Ins. Cos. v. Younesi, 48 Cal. App. 4th 451, 459 (1996).

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writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added). Further, it is within the discretion of the Court to stay non-arbitrable claims, which are related to the arbitrable claims, pending the outcome of arbitration. See United States use of Newton v. Neumann Caribbean International, Ltd., 750 F.2d 1422, 1427 (9th Cir. 1985) (affirming stay of non-arbitrable claims pending outcome of arbitration). "A district court has inherent power to control the disposition of the cases on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (denying writ of mandamus to vacate stay pending the completion of related proceedings).

Here, the Court finds Plaintiff's suit referable to arbitration under the insurance policy agreements, and the Defendant has applied to stay the trial of such actions until the arbitration has been completed in accordance with the terms of the policy agreements. Accordingly, this action is stayed pending arbitration.

IV. CONCLUSION

The Court GRANTS Defendant's Motion to Compel Arbitration. This action shall be placed on the inactive calendar and STAYED pending arbitration. The parties are directed to inform the Court upon completion of the arbitration proceedings.

IT IS SO ORDERED.

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