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Dong Feng Fang Order on Motions to Dismiss

Melvin K. Westmoreland
Fulton County Superior Court, Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

DONG FENG FANG, CHUN LEI FU,)
MAO LIN WEI, and HONG MEI ZHOU,)

Plaintiffs,)

v.)

Civil Action No: 2015CV261534

HEI INVESTMENTS, LLC, HOTEL)
EQUITIES DEVELOPMENT III, LLC,)
HOTEL EQUITIES GROUP, LLC,)
DENNIS A. MERONEY, FREDERICK W.)
CERRONE, FRIEDMAN, DEVER &)
MERLIN, LLC and SHELDON E.)
FRIENDMAN,)

Defendants.)

HEI INVESTMENTS, LLC, HOTEL)
EQUITIES DEVELOPMENT III, LLC,)
HOTEL EQUITIES GROUP, LLC,)
DENNIS A. MERONEY, FREDERICK W.)
CERRONE,)

Third Party Plaintiffs,)

v.)

HANOVER INSURANCE COMPANY,)

Third Party Defendant.)

ORDER ON MOTION TO SEVER

Before this court is Third Party Defendant Hanover Insurance Company's Motion to Sever Insurance Coverage Action from Underlying Action. Having considered the briefing of all parties on the issue, the Court finds as follows:

According to Plaintiffs' Complaint filed June 2, 2015, Defendants sought sources of equity and debt financing for the development of a hotel to be located in Dalton, Georgia (the

“Project”). Plaintiffs Fang, Fu, Wei, and Zhou invested more than \$1.7 million in the Project. However, the Project failed to close and was unable to obtain debt financing. Plaintiffs demanded the return of their invested funds. Unbeknownst to them, Defendants had transferred Plaintiffs’ funds to a non-party account, allegedly so Defendants could obtain \$9.75 million in additional funding from the non-party. Despite many inquiries, Defendants have failed to return Plaintiffs’ money to them and Plaintiffs filed this action (hereinafter, the "Underlying Action").

Third Party Plaintiffs HEI Investments, LLC, Hotel Equities Development III, LLC, Hotel Equities Group, LLC (“HEG”), Dennis A. Meroney, and Frederick W. Cerrone filed third party claims against its purported liability insurer, Hanover Insurance Company (“Hanover”). Third Party Plaintiffs contend Hanover has a duty to defend and indemnify under HEG’s Private Company Management Liability Insurance Policy (the “Policy”) with Hanover, but Hanover has denied coverage and refused to defend. Third Party Plaintiffs assert claims for breach of contract, breach of duty and negligent claims handling, bad faith, attorney’s fees, and punitive damages against Hanover (hereinafter, the “Coverage Action”).

Hanover seeks to sever the Coverage Action claims into a separate action pursuant to O.C.G.A. § 9-11-42(b) (allowing the court to order separate trial of third party claims in furtherance of convenience or to avoid prejudice) and O.C.G.A. § 9-11-14 (allowing any party to move for severance or separate trial of third party claims). “Severance is largely a matter of discretion for the trial judge, and absent clear and manifest abuse of that discretion, it will not be interfered with on appeal.” *Vitner v. Funk*, 182 Ga. App. 39, 42 (1987) (quoting *Wheels & Brakes v. Capital Ford Truck Sales*, 167 Ga. App. 532, 533(1) (1983)); see also *Atlanta Air Fleet, Inc. v. Ins. Co. of N. Am.*, 130 Ga. App. 15, 16 (1973) (trial court did not abuse discretion

in severing trial of claim against insurer from trial of claims against remaining defendants and in ordering latter claims to be tried first).

In support of its Motion, Hanover asserts that collateral source evidence will be injected into the Underlying Action that could prejudice both the insured and the insurer. Hanover asserts that the duty to indemnify cannot be determined until the Underlying Action is resolved. In particular, allocation of the ultimate settlement or judgment from the Underlying Action will be necessary before a duty to indemnify can be decided, so it is impossible for the cases to proceed simultaneously. Hanover asserts that significant coverage issues will exist, requiring allocation of covered and uncovered losses and discovery into matters related to this allocation will necessarily involve privileged information that should be shielded from Plaintiffs in the Underlying Action. Finally, Hanover asserts that it intends to remove the Coverage Action to federal court based on diversity jurisdiction should the Court sever the Coverage Action into a wholly separate case.

In response, Third Party Plaintiffs agree that the Court should sever third-party claims relating to coverage issues if they are still unresolved by trial¹ to prevent the jury from hearing evidence about insurance coverage when deciding the extent of Defendants' liability to Plaintiffs. However, they argue that the right to sever under O.C.G.A. § 9-11-42 does not create an entirely new, separate civil action which could then be removed to federal court, but instead allows for bifurcation of the claims for separate trials. They argue that the creation of a separate federal action would be nonsensical because Hanover would not be bound by this Court's ultimate determination of the basis of Defendants' liability, if any, and that issue would have to be re-litigated in federal court to determine whether Hanover had a duty to indemnify Defendants. Third Party Plaintiffs contend that completely separate actions in two separate

¹ The parties to the Third Party Complaint have cross-Motions for Summary Judgment pending.

courts would lead to duplicative discovery and the potential for inconsistent results. Finally, Third Party Plaintiffs argue that while the jurors should be shielded from evidence related to the existence or scope of an insurance policy, Plaintiffs in the Underlying Action are entitled to that information under Georgia law. *See* O.C.G.A. § 9-11-26(b)(1). Therefore, bifurcation of the claims within the same action will not cause prejudice to the insurer of the insured.

The Court agrees with Third Party Plaintiffs. Bifurcation of the Underlying Action and the Coverage Action into separate trials, if needed, will prevent any risk of collateral source evidence being presented to the factfinder or any other prejudice. However, for the sake of convenience and efficiency, all claims will remain before this Court and the Coverage Action will not be severed into an entirely separate civil action with a separate case number and caption as requested by Hanover.

SO ORDERED this 22nd day of February, 2016.



JUDGE MELVIN K. WESTMORELAND
Superior Court of Fulton County
Atlanta Judicial Circuit

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