STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
2013-CP-10-6771

MI WINDOWS AND DOORS, LLC, f/k/a MI WINDOWS & DOORS, INC., f/k/a MI HOME PRODUCTS, INC.,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; and COMMERCE & INDUSTRY INS. CO.,

Defendants.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; and COMMERCE & INDUSTRY INS. CO.,

Third-Party Plaintiffs,

vs.

LIBERTY MUTUAL FIRE INSURANCE CO., and ZURICH AMERICAN INSURANCE CO. & AMERICAN ZURICH INSURANCE CO.,

Third-Party Defendants.

ORDER GRANTING ZURICH'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING THIRD-PARTY DEFENDANTS ZURICH AMERICAN INSURANCE CO. & AMERICAN ZURICH INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Zurich American Insurance Co. & American Zurich Insurance Co.'s ("Zurich") Motion for Summary Judgment on Third-Party Plaintiffs National Union Fire Insurance Co. of Pittsburgh, PA, and Commerce & Industry Insurance Co.'s

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(collectively, "AIG") Third-Party Complaint filed on August 19, 2015. For the reasons expressed below, the Court grants Zurich's Motion for Summary Judgment.

I. Brief Background

MI Windows and Doors, LLC ("MI Windows") originally brought this suit for declaratory judgment against four insurers: Liberty Mutual Fire Insurance Co. ("Liberty"), Zurich, Fireman's Fund Insurance Co., and AIG. MI Windows sought a declaration that each insurer had a duty to indemnify it for damages arising out of *In Re: MI Windows and Doors, Inc. Product Liability Litigation*, a collection of class action lawsuits filed against MI Windows and consolidated as multi-district litigation before Judge David C. Norton of the United States District Court (Charleston) for South Carolina (the "MDL").[1] The damages claimed in the MDL occurred between 2000 and 2010, implicating Liberty as MI Windows' primary insurer from 2000-2003, Fireman's Fund as MI Windows' excess insurer from 2000-2004, Zurich as MI Windows' primary insurer from 2003-2010, and AIG as MI Windows' excess insurer from 2004-2010. MI Windows eventually settled its claims against Liberty, Zurich, and Fireman's Fund and voluntarily dismissed them from this suit. With respect to Zurich, MI Windows released its claims for further indemnity and defense payments as part of the settlement agreement, and also agreed to indemnify Zurich against any future claims against it relating to the MDL.

Following Zurich's dismissal, AIG filed a third-party complaint against Zurich seeking to compel its continued participation in this lawsuit. In Counts I and II, AIG seeks a declaration that Zurich has a continuing duty to defend and indemnify MI Windows, despite the release it secured as part of its settlement agreement with MI Windows; Count III seeks a declaration as to the number of occurrences giving rise to the MDL "in order to determine the applicable limits

[1] MI Windows subsequently amended its complaint, seeking a declaration that AIG also had a duty to defend MI Windows for the MDL litigation, and seeking damages from AIG for insurer bad faith.

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owed by Zurich" (*See* Third-Party Complaint, ¶ 39); and Count IV seeks equitable contribution from Zurich for money AIG may pay to MI Windows in the future for defense costs and indemnity related to the MDL (AIG has not paid any such costs or indemnity at this time). *See* pages 2-3 of AIG's response to Zurich's MSJ.

On April 1, 2016, Zurich filed its Motion for Summary Judgment on AIG's third-party complaint ("MSJ"), to which AIG timely responded. On April 7, 2016, this Court heard oral arguments from all the parties. Being fully apprised of all arguments, this Court grants summary judgment in favor of Zurich for the reasons set forth below.

II. Legal Standard

Under Rule 56 of the South Carolina Rules of Civil Procedure, the Court may grant summary judgment where a party demonstrates that undisputed facts entitle it to judgment as a matter of law. *Sloan v. Friends of the Hunley, Inc.*, 630 S.E.2d 474, 477 (S.C. 2006). Where the Court confronts a pure issue of law, such as the interpretation of a legal document or standing, the issue is susceptible to resolution at the summary judgment stage. *Id.*

III. Discussion

a. AIG lacks standing to assert Counts I-III against Zurich.

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy," which includes a showing of "standing." *Holden v. Cribb*, 561 S.E.2d 634, 637 (Ct. App. S.C. 2002). Standing is the assertion of "an enforceable legal right." *Whittle v. C.E. Jeffcoat,* 413 S.E.2d 865, 865 (Ct. App. S.C. 1992).

Counts I-III of AIG's complaint fail for lack of standing, as each count asserts rights that arise under contracts to which AIG was not a party. Only MI Windows, not AIG, may compel the insurers with which it contracted for primary insurance coverage to pay benefits due under

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the contract. Accordingly, AIG, a non-party to these contracts, may not challenge MI Windows' decision to settle and release these insurers from their contractual obligations absent a specific legal or contractual right to do so.[2] Based on the undisputed facts of this case, AIG has neither, and so may not compel the relief it seeks. *See Hill v. Canal Ins. Co.*, 2012 WL 3135402, at *2-3 (D.S.C. Aug. 1, 2012) (dismissing declaratory judgment action brought by a non-party to the policy); *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of Am.*, 2014 WL 3687338, at *7 (D.S.C. Jul. 22, 2014) (dismissing action brought by one insurer that sought a declaration that second insurer had a duty to defend).[3]

b. AIG's claim for equitable contribution fails as a matter of law.

A claim for equitable contribution between insurers will only lie where both insurers cover the same risk. *Lucas v. Garrett*, 41 S.E.2d 212, 214 (S.C. 1947) ("[A]s a prerequisite to enforcing contribution between insurers, it is essential that both policies insure the same interest against the same casualty."). Here, AIG's excess policies do not cover the same risk as Zurich's primary policies because by definition, the risk covered by AIG's policies does not begin until the policy limits of the underlying policies are exhausted. *See, e.g., Auto-Owners Ins. Co. v. Great Am. Ins. Co.*, 479 Fed. App'x 228, 233-34 (11th Cir. 2012) (finding excess and primary carriers do not cover the "same loss" because their coverage starts at different thresholds). Accordingly, because AIG's policies do not cover the same risk as Zurich's policies, AIG's claim for equitable contribution fails as a matter of law.

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[2] *See Hack v. Metz*, 176 S.E. 314, 316-17 (S.C. 1934) (the exercise of the insured's rights under an insurance contract requires the insured's authorization and consent).

[3] To the extent AIG contends that MI Windows' settlement with Zurich did not fully exhaust MI Windows' primary limits, AIG may raise this argument as a defense to coverage under its own policy, which states that AIG's duty to indemnify is only triggered once MI Windows' primary limits are exhausted. *See* MSJ, Facts, ¶ 17.

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AIG's claim also fails because a party may not seek equitable contribution for sums that it has not paid. *See First Gen. Servcs. of Charlston, Inc. v. Miller*, 445 S.E.2d 446,448 (S.C. 1994). Here, the undisputed facts show that AIG has yet to pay any money to MI Windows in relation to the MDL. It therefore may not seek equitable contribution towards an obligation it has not yet attempted to satisfy through payment.

c. Alternatively, Zurich is not a proper third-party defendant under Rule 14 of the South Carolina Rules of Civil Procedure.

Under Rule 14, a "third-party plaintiff must have a substantive claim against the third party defendant founded upon derivative liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 445 S.E.2d 446 (S.C. 1994). "To the extent that [a defendant/third-party plaintiff's] claim against [a third-party defendant] is based on a theory that [the third-party defendant], rather than [the defendant] was responsible for the [plaintiff's] damages, what it presents as a third party claim is really a defense [e.g., somebody else did it]." *Tetra Tech EC/Tesoro Joint Venture v. Sam Temples Masonry, Inc.*, 2011 WL 1048964, at *5 (D.S.C. Mar. 21, 2011).

Here, AIG's counts for declaratory judgment (Counts I - III) fail to allege that Zurich is derivatively liable to AIG. Instead, AIG contends that Zurich should remain primarily liable to MI Windows for damages associated with the MDL, and that AIG's liability has not yet ripened for lack of primary exhaustion. *See* Third-Party Complaint, ¶¶ 25-26, 31-32, and 36-39. These are affirmative defenses, not derivative liability claims, and thus may not serve as a basis for impleading Zurich under South Carolina law. Furthermore, while Count IV could conceivably serve as a basis for impleader in an appropriate case, because AIG has not plead a sufficient basis for equitable contribution (see above) AIG may not rely on this count for purposes of impleading Zurich into this case.

d. AIG's request for declaratory relief would have no practical legal effect.

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Finally, the settlement entered between Zurich and MI Windows renders any judgment that this Court would have entered moot, because it would have no practical legal effect on the parties. *See, e.g., Friends of the Hunley, Inc.*, 630 S.E.2d at 477 (acknowledging that a case is moot where "a judgment rendered by the court will have no practical legal effect upon an existing controversy."). AIG seeks declarations that Zurich has a "continuing duty" "to defend" and "indemnify" MI Windows for the MDL, and that Zurich "owes" additional "limits" to satisfy MDL-related claims because of the number of occurrences at issue. *See* Third-Party Complaint, ¶¶ 26, 32, and 39. These are the very matters that Zurich has resolved via settlement with MI Windows. *See* MSJ, Facts ¶¶ 20-22. MI Windows also released Zurich from any further liability for the MDL lawsuits, and subsequently dismissed Zurich from this action with prejudice. *See* MSJ, Facts ¶ 22.

Regardless of how this Court were to rule on AIG's claims, MI Windows' release with Zurich is *res judicata* as to all issues arising from, or related to, the Zurich policies. *See U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013) ("[W]here a dismissal is based on a settlement agreement, the principles of *res judicata* apply . . . to the matters specified in the settlement agreements.") (internal quotations and citations omitted). The practical effect of Zurich's settlement with MI Windows is that the issues framed in AIG's counts for declaratory judgment are moot, warranting their dismissal via summary judgment. *See Ex Parte S.C. State Highway Dept. v. McKeown Food Store No. 9,* 174 S.E.2d 342, 344 (S.C. 1970) (a voluntary settlement renders moot the action upon which the settlement is based); *Allen v. State of Ga.*, 166 U.S. 138, 140 (1897) (a settlement leaves "no actual controversy pending").

IV. Conclusion

In light of the foregoing, it is hereby ORDERED AND ADJUDGED that:

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1. Zurich's Motion for Summary Judgment is GRANTED.
2. This Order constitutes the final decision of the Court, thus, ending all claims against Zurich. All arguments made by the parties and submissions have been fully reviewed and considered and this Order is intended to serve as a Final Judgement.

IT IS SO ORDERED.

May 23, **2016**
Charleston, South Carolina

Presiding Judge Ninth Judicial Circuit

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