UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 2:21-cv-14053-KMM

KINSALE INSURANCE COMPANY,

Plaintiff,

v.

PRIDE OF ST. LUCIE LODGE 1189, INC., *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiff/Counterclaim Defendant Kinsale Insurance Company's ("Kinsale") Motion for Final Summary Judgment. ("Mot.") (ECF No. 100). Defendants/Counterclaim Plaintiffs Teaira Nicole Reed ("Reed"), as personal representative of the Estate of Tanya Renee Oliver ("Estate"), and Pride of St. Lucie Lodge 1189, Inc. ("the Lodge") filed responses. ("Reed Resp.") (ECF No. 108); ("Lodge Resp.") (ECF No. 115). Kinsale filed a reply to both responses.[1] ("Reply") (ECF No. 124). Kinsale's Motion for Final Summary Judgment is now ripe for review.

I. BACKGROUND[2]

This case arises from a fatal shooting in the parking lot of an event space in Fort Pierce,

[1] Kinsale also filed an unopposed motion to file a reply in excess of the page limits. (ECF No. 127). The Court GRANTS Kinsale's motion.

[2] The following facts are taken from Kinsale's Statement of Undisputed Facts ("Kinsale 56.1") (ECF No. 99), Reed's Statement of Material Facts ("Reed Resp. 56.1") (ECF No. 107), the Lodge's Statement of Material Facts ("Lodge Resp. 56.1") (ECF No. 114), Kinsale's Reply Statement of Material Facts ("Kinsale Reply 56.1") (ECF No. 125), and a review of the corresponding record citations and exhibits.

Florida. The Lodge operates a clubhouse for a fraternal organization, which hosts social events on weekend nights. The Lodge carried a $1,000,000.00 surplus lines general liability insurance policy from Kinsale. The Kinsale policy limited insurance coverage to $50,000.00 for claims arising out of assault and battery. The Lodge also carried a liquor liability policy from Mount Vernon. The Mount Vernon policy covered liability for bodily injury where alcohol was involved. The Mount Vernon policy limited insurance coverage to $300,000.00 for assault and battery.

On Sunday, March 1, 2015, the Lodge hosted a "Grown and Sexy" social event. Alcohol was served and the event featured a DJ. The Lodge had volunteer security guards present for the event who conducted bag searches and employed metal detectors. At some point during the night, a fight broke out between two groups of patrons. The patrons were ejected from the Lodge and the fight continued in the parking lot. In the early hours of March 2, Tanya Oliver was shot in the head while she was seated in the passenger seat of a vehicle in the Lodge's parking lot.

Kinsale first received notice of the shooting on November 23, 2015—over eight months after the incident. The notice included an email from the Lodge's retail agent, who stated that the Lodge initially claimed that the shooting "wasn't connected to the [Lodge]." By November 2015, however, the Lodge evidently acknowledged that "the victim was actually in their parking lot." Kinsale assigned a senior claims examiner, Catherine Thrift, to investigate.

Thrift quickly discovered two news articles about the incident. At least one of the articles stated that Tanya Oliver remained "in critical condition in the ICU" after she was shot in the head while sitting in a car in the Lodge's parking lot. In late November and early December, Thrift discussed the incident and the Lodge's security situation with the Lodge's representative. Thrift also discussed the incident with the Lodge's retail agent, who advised that it was unclear whether the Lodge was open at the time of the shooting.

On December 2, 2015, Thrift received a letter sent from Teaira Reed's attorney to the Lodge and a copy of the police report. The letter from Teaira Reed's attorney was dated November 5, 2015. The first paragraph of the letter reads as follows:

> Please be advised that this office represents Teaira Reed as Legal Guardian to Tanya Oliver, in connection with the injuries she sustained in the incident that occurred on March 2, 2015. You may be responsible for the injuries Tanya Oliver sustained and you need to contact your insurance carrier immediately in order to protect your interests.

The letter does not describe the incident, explain what the Lodge did wrong, or state why the Lodge might be liable. Thrift sent Reed's attorney the Lodge's insurance information the day after Thrift received the letter.

The brief narrative section of the police report describes how officers arrived at the Lodge's address to find a large crowd surrounding a car with a gunshot victim, Tanya Oliver, seated in the front passenger seat. The driver of Oliver's car, Patricia Almore apparently witnessed a shooter firing at Almore's vehicle from an SUV that fled the scene before the police arrived. Two men who worked security for the Lodge told the police that they had removed Almore and another woman from the Lodge earlier in the night for fighting. The fight continued in the Lodge's rear parking lot before both women separated and continued to their vehicles. The police report does not explicitly state where the shooting occurred or assign any fault to the Lodge.

On December 3, 2015, Thrift contacted David Danowit of Mitchell Claims Service, Inc. ("Mitchell Claims"), the independent claims adjuster retained by Mount Vernon to investigate the incident at the Lodge.[3] Thrift notified Danowit that the Kinsale policy provided general liability coverage and Danowit agreed to share the results of his investigation with Kinsale.[4] According to

[3] Danowit passed away before he could be deposed in connection with this matter.

[4] Reed's principal objection to Kinsale's Statement of Undisputed Facts concerns the scope of Danowit's investigation on behalf of Mitchell Claims. *See, e.g.*, Reed 56.1 ¶¶ 32, 34, 35, 42–44, 57; Lodge 56.1. However, none of the record evidence cited by Reed properly contradicts

Danowit, two women from different groups got into a fight on the dance floor. Both groups had been drinking alcohol. Lodge security broke up the fight and escorted the groups out of the Lodge through separate doors on opposite sides of the building. Danowit reported that a Lodge security guard stated that the shooting occurred "just outside the gated rear parking lot area" ten to fifteen minutes after security broke up the fight inside the Lodge. Danowit told Thrift that his investigation turned up no surveillance tapes and no witnesses.

Danowit attempted to contact Reed's attorney Joseph Landy on at least six occasions between December 2015 and March 2016. Landy never responded or sent a demand to Kinsale or Mount Vernon. Unbeknownst to Kinsale, Mount Vernon, or Mitchell Claims, Landy referred the matter to the Haggard Law Firm ("Haggard") in December 2015. Landy apparently believed that "it would be best to put [the case] in the hands of a firm that . . . did exclusively negligent security work." Landy told no one at Kinsale or Mount Vernon that Haggard now represented Reed. Haggard similarly never contacted or sent any demand to Kinsale or Mount Vernon prior to filing suit in August 2016.

On March 1, 2016, Danowit reported to Thrift that he "does not see any liab[ility]" for the Lodge and that he "doesn't think they have a case." Four months later, Tanya Oliver died from her injuries. On August 5, 2016, Teaira Reed, as personal representative of the estate of Tanya Oliver, filed a complaint in state court against the Lodge for "negligent security" arising out of the shooting of Oliver. Kinsale first received a copy of the complaint on August 12, 2016. Mount

---

Kinsale's statements regarding Danowit's investigation. For example, Reed points repeatedly to a December 30, 2015 report by Danowit in support of its view that Danowit conducted a narrow liquor liability investigation. *See, e.g.*, Reed 56.1 ¶¶ 34, 44 (citing ("Alfeche Dep. Ex. Oliver 01") (ECF No. 95) at 53–60). It is not clear why the Court should ignore that six of the report's eight pages explicitly describe the investigation of a "comprehensive general liability/bodily injury claim" while Danowit's description of the "Liquor Liability Investigation" takes up less than a single page of the report. *See* ("Alfeche Dep. Ex. Oliver 01") (ECF No. 95) at 53–60.

Vernon disclaimed liability soon after. On August 16, 2016, Kinsale tendered its $50,000.00 assault and battery sublimit to Reed. The Estate rejected Kinsale's settlement offer and the case proceeded to trial. The jury ultimately found that Oliver and her friends were 30% liable and the Lodge was 70% liable. Judgment was entered against the Lodge for almost $3.5 million.

On February 2, 2021, Kinsale filed a Complaint asking this Court to enter a judgment declaring that the surplus lines commercial general liability policy's $50,000.00 assault and battery endorsement applies to the state court judgment. ("Compl.") (ECF No. 1). In response, Reed and the Lodge asserted a "bad faith" counterclaim against Kinsale. *See generally* ("Reed Am. Countercl.") (ECF No. 45); ("Lodge Am. Countercl.") (ECF No. 47). Reed and the Lodge contend that Kinsale breached its duty of good faith to settle Reed's claims against the Lodge within the policy limits when Kinsale had the opportunity to do so. *See generally id.*

The Parties eventually agreed that Kinsale has no contractual liability beyond the $50,000.00 assault and battery endorsement. *See* (ECF Nos. 44, 46, 48, 50). The Parties disagree, however, as to Kinsale's extracontractual liability, if any, for its alleged bad faith failure to timely tender the $50,000.00 sublimit. *See id.* Now, Kinsale moves for summary judgment. *See generally* Mot.

II. APPLICABLE LAW

a. Summary Judgment Standard

Summary judgment is appropriate where there is "no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). "For factual issues to be considered

genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Speculation cannot create a genuine issue of material fact sufficient to defeat a well-supported motion for summary judgment. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005).

The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In assessing whether the moving party has met this burden, a court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to present evidence showing a genuine issue of material fact that precludes summary judgment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002); Fed. R. Civ. P. 56(e). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citation omitted). But if the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

b. Florida's Bad Faith Insurance Law

In diversity cases, federal courts must apply the substantive law of the forum state. *Bravo v. United States*, 577 F.3d 1324, 1325 (11th Cir. 2009). Florida courts have long recognized "the good faith duty insurers owe to their insureds in handling their claims." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 6 (Fla. 2018). The Supreme Court of Florida established the standard for insurer good faith in *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980):

> This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Id. at 785 (citations omitted).

In *Boston Old Colony*, the court states "in no uncertain terms that an insurer 'has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Harvey*, 259 So. 3d at 8 (quoting *Bos. Old Colony*, 386 So. 2d at 785). Ultimately, "the purpose of an insurer's obligation to act in good faith is to protect an insured from an excess verdict." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 672 (Fla. 2004).

In Florida, "the essence of a third-party bad faith cause of action is to remedy a situation in which an insured is exposed to an excess judgment because of the insurer's failure to properly or promptly defend the claim." *Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2006). Florida law evaluates "the question of whether an insurer has acted in bad faith in handling claims against the insured" under a "totality of the circumstances" standard. *Berges*, 896 So. 2d at 680. "[T]he critical inquiry in a bad faith action is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey*, 259 So. 3d at 7. Accordingly, a claimant's "actions can[not] let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith in handling the insured's claim." *Id.* at 11. A bad faith case must therefore focus on the actions of the insurer rather than those of the claimant. *Berges*, 896 So. 2d at 677.

Florida courts traditionally recognized "that an insurance company may not be held liable for bad faith failure to settle within its policy limits if an offer to settle within policy limits was never communicated to the insurer." *Snowden ex. rel. Est. of Snowden v. Lumbermens Mut. Cas.*

Co., 358 F. Supp. 2d 1125, 1127 (N.D. Fla. 2003) (collecting cases). Florida's Third District Court of Appeal recognized an exception to the traditional settlement demand requirement for bad faith cases in *Powell v. Prudential Property & Casualty Insurance Co.*, 584 So. 2d 12 (Fla. Dist. Ct. App. 1991).[5] In *Powell*, the court imposed an affirmative duty upon the insurer to initiate settlement negotiations "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely." *Id.* at 14. Accordingly, in a case where a clearly liable insured faces massive financial exposure, "any delay in making an offer under the circumstances of [the] case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith." *Harvey*, 259 So. 3d at 7 (quoting *Goheagan v. Am. Vehicle Ins. Co.*, 107 So. 3d 433, 439 (Fla. Dist. Ct. App. 2012)) (cleaned up).

III. DISCUSSION

Kinsale contends that it should not be held liable for bad faith because the liability for its insured was never clear. *Powell* instructs that an insurer's affirmative duty to initiate settlement negotiations exists only "where liability is clear." *Powell*, 584 So. 2d at 14. Kinsale argues that the undisputed facts show that neither Kinsale, Mount Vernon, the Lodge, nor the investigator from Mitchell Claims believed the Lodge to be clearly liable for any claims arising from the shooting before the Estate filed its negligent security claim in state court. *See generally* Mot. In response, Reed and the Lodge dispute the adequacy of Kinsale's investigation and submit that Florida law requires a jury to evaluate the bad faith claim under a "totality of the circumstances" standard. *See generally* Reed Resp.; Lodge Resp.

Powell imposes an affirmative duty to initiate settlement negotiations only "where liability

[5] The Florida Supreme Court has since recognized that Powell applies outside the Third District. *See Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018) (invoking *Powell*).

is clear." *Powell*, 584 So. 2d at 14. By way of example, the insurance company in *Powell* evaluated liability for its insured "as 80–100%." *See id.* at 13. Similarly, the "*Powell* cases" cited by Reed and the Lodge uniformly acknowledge the clear liability of the insured before moving on to further analysis. *See, e.g.*, *Bannon v. GEICO Gen. Ins. Co.*, 743 F. App'x 311, 312 ("GEICO made a determination on November 5 that [the insured] was 100% at fault."); *Markel Am. Ins. Co. v. Flugga*, No. 5:11-cv-588, 2013 WL 1289522, at *2 (M.D. Fla. Mar. 13, 2013) ("[I]t was undisputed that [the insured] was at fault."); *Snowden*, 358 F. Supp 2d at 1128 ("In the instant case, liability was clear from the outset and known to [the insurer]."); *see also Harvey*, 259 So. 3d 1, 4 ("GEICO resolved the liability issue adversely to [its insured].").

Reed and the Lodge do not meaningfully address Kinsale's reliance on *Powell*'s statement regarding clear liability. Instead, they focus on the broader "totality of the circumstances" standard governing bad faith claims once an insurer had an affirmative duty to enter into settlement negotiations. Reed and the Lodge contend that the record contains sufficient evidence from which a reasonable jury could conclude Kinsale acted in bad faith in the handling of the Estate's negligent security claim against the Lodge. But, as noted above, the *Powell* cases cited by Reed and the Lodge address—albeit often briefly—whether liability for the insured was clear before moving on to further analysis. Reed and the Lodge cite no case—and the Court's own research has found none—in which an insurer committed bad faith under *Powell* in the face of unclear liability for its insured.

The only way Kinsale could have acted in bad faith is if Kinsale had an "affirmative duty to initiate settlement negotiations" under *Powell*. The undisputed facts show that liability for the Lodge was never clear. At no point during the claim investigation did Kinsale or Mitchell Claims ever consider the Lodge liable. In fact, none of the parties who looked into the Lodge's liability

ever suggested that the Lodge might bear more than questionable liability. And a jury ultimately found the Lodge only 70% liable. That the Estate waited over a year after the shooting to file its negligent security action against the Lodge also cuts against the theory that the Lodge was clearly liable. As *Powell* imposes a duty to initiate settlement negotiations only where liability is clear, no reasonable jury could conclude that Kinsale acted in bad faith in handling the Lodge's claim. Accordingly, Kinsale is entitled to summary judgment.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Kinsale's Motion for Final Summary Judgment (ECF No. 100) is GRANTED. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, final judgment shall be entered by separate order. The Clerk of Court is INSTRUCTED to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this *14th* day of July, 2022.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record