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United States District Court, M.D. Florida,
Jacksonville Division.

L. SQUARED INDUSTRIES, INC., Plaintiff,

v.

NAUTILUS INSURANCE COMPANY, Defendant.

Case No. 3:21-cv-1104-BJD-PDB

Signed June 23, 2023

Synopsis

Background: Operator of gas stations brought state court action against its surplus lines insurer, seeking declaratory judgment that it provided timely notice to insurer during policy period of underground discharge of gasoline and diesel from one of its storage tanks, as well as alleging breach of policy due to insurer's refusal to pay for corrective action and defense costs. Action was removed on basis of diversity jurisdiction. Parties cross-moved for summary judgment.

Holdings: The District Court, Brian J. Davis, J., held that:

[1] law of Florida, rather than law of New York, applied;

[2] operator "first discovered" discharge before effective date of policy and, thus, was not entitled to coverage for corrective costs arising from discharge;

[3] operator failed to notify insurer of correspondence from Florida Department of Environmental Protection (FDEP) containing report within seven days as required by policy and, thus, operator was not entitled to coverage for corrective costs arising from discharge; and

[4] operator was not entitled to recover defense costs from insurer.

Insurer's motion granted; insured's motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (21)

[1] **Environmental Law** ⇐ Hazardous, Dangerous, or Toxic Waste

Congress enacted the **Resource Conservation and Recovery Act** (RCRA) to end the environmental and public health risks associated with the mismanagement of **hazardous waste**. Solid Waste Disposal Act §§ 1002, 11011, 42 U.S.C.A. §§ 6901, 6992k.

[2] **Environmental Law** ⇐ Treatment, storage, and disposal; facilities and sites

The **Resource Conservation and Recovery Act** (RCRA) generally prohibits the treatment, storage, or disposal of **hazardous waste** at private or governmental facilities without a permit issued by either the Environmental Protection Agency (EPA) or an authorized state. Solid Waste Disposal Act §§ 3005, 6001, 42 U.S.C.A. §§ 6925(a), 6961.

[3] **Environmental Law** ⇐ Hazardous, Dangerous, or Toxic Waste

The **Resource Conservation and Recovery Act** (RCRA) expressly contemplates that state and local governments will play a lead role in solid waste regulation. Solid Waste Disposal Act § 1002, 42 U.S.C.A. § 6901(a)(4).

[4] **Summary Judgment** ⇐ Scintilla of evidence; minimal amount

A mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment. Fed. R. Civ. P. 56.

[5] **Federal Courts** ⇐ Substance or procedure; determinativeness

Under *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.

[6] **Federal Courts** ⇐ Conflict of Laws; Choice of Law

Under *Erie*, the prohibitions against independent determinations by federal courts extend to the field of conflict of laws.

[7] **Federal Courts** ⇐ Conflict of Laws; Choice of Law

In accordance with *Erie* doctrine, the conflict of law rules to applied by a federal court in Florida must conform to those prevailing in Florida's state courts.

[8] **Environmental Law** ⇐ Concurrent and Conflicting Statutes or Regulations

Did application of New York law violate Florida public policy?

Yes

Material Facts

- In conjunction with Resource Conservation and Recovery Act, Florida Department of Environmental Protection (FDEP) was authorized under state law to control and prohibit air and water pollution
- State's administrative law precluded application of environmental financial responsibility mechanisms that included choice of law and venue in favor of jurisdiction other than Florida

Causes of Action

Declaratory Judgment > Insurance Coverage or Liability

Breach of Contract

Under Florida's conflict of law rules, law of Florida, rather than law of New York, applied in action brought by operator of gas stations against its surplus lines insurer, seeking declaratory judgment that it provided timely notice to insurer during policy period of underground discharge of gasoline and diesel from one of its storage tanks, as well as alleging breach of policy due to insurer's refusal to pay for corrective action and defense costs, as application of New York law would violate Florida public policy; in conjunction with **Resource Conservation and Recovery Act**, Florida Department of Environmental Protection (FDEP) was authorized under state law to control and prohibit air and water pollution, and state's administrative law precluded application of environmental financial responsibility mechanisms that included choice of law and venue in favor of jurisdiction other than Florida. Solid Waste Disposal Act §§ 1002, 3005, 6001, 42 U.S.C.A. §§ 6901(a)(4), 6925(a), 6961; Fla. Stat. Ann. §§ 376.30701(2), 403.061; Fla. Admin. Code Ann. r. 62-761.420(7).

More cases on this issue

[9] **Contracts** ⇐ Agreements relating to actions and other proceedings in general

While Florida courts generally enforce choice of law provisions, the designated law will not govern if it violates public policy of forum state.

[10] **Insurance** ⚷ Plain, ordinary or popular sense of language

Under Florida law, insurance policies are construed according to their plain meaning.

[11] **Insurance** ⚷ Construction as a whole

Insurance ⚷ Reasonableness

When interpreting insurance policies under Florida law, courts read all the policy provisions in tandem to find the most reasonable and probable interpretation.

[12] **Insurance** ⚷ Necessity of ambiguity

Insurance ⚷ Favoring coverage or indemnity; disfavoring forfeiture

Under Florida law, because insurance coverage must be interpreted broadly and its exclusions narrowly, ambiguities are construed against the insurer and in favor of coverage, so long as the provision at issue is ambiguous.

[13] **Insurance** ⚷ Ambiguity in general

Insurance ⚷ Plain, ordinary or popular sense of language

Under Florida law, insurance policies are interpreted according to the plain language of the policy, except when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.

[14] **Insurance** ⚷ Construction or enforcement as written

Insurance ⚷ Exceptions, exclusions or limitations

Under Florida law, if an insurance policy provision is clear and unambiguous, it should be enforced according to its terms, whether it is basic policy provision or exclusionary provision.

[15] **Insurance** ⚷ Language of policies

Under New York law, an insurance policy is interpreted to give effect to intent of parties as expressed in clear language of policy.

[16] **Insurance** ⚷ Ambiguity in general

Insurance ⚷ Construction as a whole

Under New York law, a court may determine if an ambiguity exists in an insurance policy by asking whether, affording a fair meaning to all of the language employed by the parties in the policy and leaving no provision without force and effect, there is a reasonable basis for a difference of opinion as to the meaning of the policy.

[17] **Insurance** ⚷ Pollution

Did policy provide coverage?

No

Material Facts

- Operator of gas stations "first discovered" discharge of gasoline and diesel under one of its stations before July 18, 2018, the effective date of its surplus lines policy
- Florida Department of Environmental Protection (FDEP) inspected gas station on May 23, 2017 and directed operator to take corrective action
- Operator of gas stations took corrective

action by July 2017, and operator signed discharge report form which was filed on March 8, 2018, indicating the "date of discovery" was July 2017

Causes of Action

Declaratory Judgment > Insurance Coverage or Liability

Breach of Contract

Under Florida law, operator of gas stations "first discovered" discharge of gasoline and diesel underneath one of its stations before July 18, 2018, the effective date of its surplus lines policy and, thus, operator was not entitled to coverage for corrective costs arising from discharge, as policy excluded from coverage "pollution conditions known to exist prior to inception of the policy"; Florida Department of Environmental Protection (FDEP) inspected gas station on May 23, 2017 and directed operator to take corrective action, operator took such action by July 2017, and operator signed discharge report form which was filed on March 8, 2018, indicating the "date of discovery" was July 2017.

More cases on this issue

[18] **Insurance** Timeliness

Insurance Effect of Noncompliance with Requirements

Did policy provide coverage?

No

Material Facts

- Although operator should have notified insurer by August 23, 2018, it waited until April 19, 2019 to report contamination

Causes of Action

Declaratory Judgment > Insurance Coverage or Liability

Breach of Contract

Under Florida law, operator of gas stations failed to notify its surplus lines insurer of correspondence from Florida Department of Environmental Protection (FDEP), containing report which identified gasoline and diesel contamination underneath one of its stations due to leak, within seven days of receiving the correspondence as required by policy and, thus, operator was not entitled to coverage for corrective costs arising from discharge; although operator should have notified insurer by August 23, 2018, it waited until April 19, 2019 to report contamination.

More cases on this issue

[19] **Insurance** Pleadings

Under Florida law, a liability insurer's obligation to defend claim made against its insured must be determined solely from allegations in complaint.

[20] **Insurance** Pleadings

Under Florida law, an insurer's duty to defend its insured arises when complaint alleges facts that fairly and potentially brings suit within policy coverage.

[21] **Insurance** Defense Costs, Supplementary Payments and Related Expenses

Did policy provide coverage?

No

Material Facts

- Operator of gas stations first knew of the existence of discharge before policy was effective
- Florida Department of Environmental Protection (FDEP) contained a report identifying discharge
- Even if operator first learned of discharge during policy period through correspondence from FDEP, it failed to notify insurer of discharge within seven days as required by policy

Causes of Action

Declaratory Judgment > Insurance Coverage or Liability

Breach of Contract

Under Florida law, operator of gas stations was not entitled to recover defense costs, from its surplus lines insurer, associated with underground discharge of gasoline and diesel at one of its stations and corrective action taken in response to discharge and correspondence from Florida Department of Environmental Protection (FDEP); operator first knew of the existence of discharge before policy was effective, and even if it first learned of discharge during policy period through correspondence from FDEP, which contained a report identifying discharge, it failed to notify insurer of discharge within seven days as required by policy.

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Sina Bahadoran, Aaron L. Warren, Clyde & Co. U.S. LLP, Miami, FL, for Defendant.

ORDER

BRIAN J. DAVIS, United States District Judge

*1 **THIS CAUSE** is before the Court on cross-motions for summary judgment. Defendant moves for summary judgment (Docs. 51; 77), which Plaintiff opposes (Doc. 65). Likewise, Plaintiff moves for summary judgment (Docs. 57; 75), which Defendant opposes (Docs. 66; 81).

A. Background

This is a lawsuit about whether Defendant owes a duty to "cover accidental releases of petroleum from underground storage tanks." (Doc. 5 at ¶ 7). This suit was originally filed in state court and removed to federal court based on diversity jurisdiction. (Doc. 1).

Plaintiff is a Florida corporation that operates gas stations, including one gas station in St. Augustine, Florida. (Doc. 49.1 at 4). Defendant is a corporation authorized to issue insurance policies for underground storage tanks used at gas stations. (Docs. 5 at ¶ 3; 49.20).

Defendant issued an insurance policy to Plaintiff for coverage from July 18, 2018 to July 18, 2019. (Doc. 49.20 at 8). The policy covered "storage tank systems cleanup costs[,] third party bodily injury[,] property damage liability[, and] defense[.]" Id. (cleaned up). The policy was issued under

the "Florida Surplus Lines Law." Id.; see also Fla. Stat. §§ 626.913–626.937; 42 U.S.C. § 6991b(d).

a. Federal and State Regulatory Scheme

[1] [2] [3] "In 1976, Congress passed the **Resource Conservation and Recovery Act** [(RCRA)], which amended the Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 6901–6992k." United States v. Kentucky, 252 F.3d 816, 821–22 (6th Cir. 2001). "Congress enacted the RCRA to end the environmental and public health risks associated with the mismanagement of **hazardous waste**." Id. at 822 (referencing Sierra Club v. United States Dep't of Energy, 734 F. Supp. 946, 947 (D. Colo. 1990)). "Generally the RCRA prohibits the treatment, storage, or disposal of **hazardous waste** at private or governmental facilities without a permit issued by either the United States Environmental Protection Agency [(EPA)] or an authorized state." Kentucky, 252 F.3d at 822; see also 42 U.S.C. §§ 6925(a), 6961. "The RCRA expressly contemplates that state and local governments will play a lead role in solid waste regulation." Kentucky, 252 F.3d at 822; see also 42 U.S.C. § 6901(a)(4).

Congress authorized the Assistant Administrator of the Environmental Protection Agency appointed to head the Office of Solid Waste to "promulgate release detection, prevention, and corrective regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." 42 U.S.C. § 6991b(a); see also 42 U.S.C. § 6911a (defining "Administrator" as used throughout the RCRA). The Administrator is tasked with promulgating specific regulations, including the "requirements for taking corrective action in response to a release from an underground storage tank" and the "requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank." 42 U.S.C. §§ 6991b(c)(4), (6).

*2 In Florida, state legislators authorized the Florida Department of Environmental Protection (FDEP) "to control and prohibit" air and water pollution. Fla. Stat. § 403.061. Florida allows FDEP to promulgate administrative rules through the FDEP secretary. See Fla. Stat. 376.30701(2).

Within the rules, FDEP "provide[s] requirements for underground storage tanks systems that store regulated substances [ ] to minimize the occurrence and environmental risks of releases and discharges." Fla. Admin. Code r. 62-761.100 (2017). Those requirements include compliance inspections and what happens if a facility fails a compliance inspection. See Fla. Admin. Code r. 62-761.100(3) (2017); Fla. Admin. Code r. 62-761.430 (2017); Fla. Admin. Code r. 62-761.420 (2017).

b. July 2017 Discharge Incident

On May 23, 2017, FDEP inspected Plaintiff's St. Augustine gas station. (See Docs. 49.2; 57.6). In the report following the inspection, the FDEP identified two new violations, including not repairing a "component or piping which has or could cause a discharge or release." (Docs. 49.2 at 4; 57.6 at 3). FDEP directed Plaintiff to take corrective action, including to complete hydrotesting to "determine if a discharge could have occurred." (Docs. 49.2 at 4; 57.6 at 3). If the testing failed, then Plaintiff was required to collect "closure samples." (Docs. 49.2 at 4; 57.6 at 3). Additionally, Plaintiff had to address "cracked boots." (Docs. 49.2 at 4; 57.6 at 3). The report also indicated there was "[n]o indication of new release" of pollutants during the inspection. (Docs. 49.2 at 5; 57.6 at 4).

Inspectors twice contacted Plaintiff via letters requesting updates. (See Doc. 49.4). Plaintiff did not respond, though a representative for Plaintiff could not confirm ever receiving the letters. (Doc. 49.1 at 16).

By June 13, 2017, Plaintiff hired a contractor to perform the corrective actions on the cracked boots and the hydrotesting. (Doc. 49.5). The contractor indicated that the hydrotesting failed. Id. at 2; (see also Doc. 49.6 at 10) (showing the contractor was "responding to a noncompliant notice" and that it was responding to specific instructions from FDEP, including running hydro-testing, which failed). By August 25, 2017, the contractor removed and replaced the cracked boots. (Doc. 57.8 at 3).

In August 2017, Plaintiff hired a company to conduct the sampling required by the FDEP because the hydrotesting failed. (See Docs. 49.2 at 4; 57.6 at 3; 49.9; 57.8). The 35-page report made several findings, including there was both hydrocarbon vapors and soil contamination present at the locations the FDEP deemed in violation. (Docs. 49.9 at 9; 57.8 at 8). The company then sent its report to FDEP. (See Doc. 49.11) (stating FDEP received the report on February 9, 2018).

After FDEP reviewed the report, it determined the report was not "in compliance with" Department guidelines and that further corrective action needed to be completed, including more sampling. Id.; (see also Doc. 57.9). The Discharge Report Form (DRF) identifies that the leak was discovered in July 2017. [1] (Docs. 49.2; 57.10). The DRF also identified that the discharged substance was gasoline and diesel and that it was affecting the soil and groundwater. (Docs. 49.2; 57.10).

*3 The DRF was completed and signed by Plaintiff, not by a third party or by FDEP. (Docs. 49.2; 57.10). The DRF also instructs the signee to "remember to properly notify your insurance company of this reported discharge in accordance with the reporting requirements outlined in your insurance policy." (Docs. 49.2; 57.10).

c. The Insurance Policy

Defendant issued Plaintiff an insurance policy for coverage from July 18, 2018 to July 18, 2019. (Docs. 49.20; 57.4). The policy states that Defendant "will pay on behalf of [Plaintiff]" when Plaintiff "becomes legally obligated to pay [ ]damages because of cleanup costs in excess of the deductible" if pollution conditions emanate "from the covered location(s) listed in the" policy, "provided that the claim or suit is first brought against [Plaintiff] during the policy period, and provided that [Plaintiff] reports the claim or suit to [Defendant], in writing, during the policy period or Extended Reporting Period, if applicable." (Doc. 49.20 at 12). Further, the policy explains that "[s]uch pollution conditions must commence on or after the Retroactive Date set forth" in the policy. Id.

The Retroactive Date is defined as July 18, 2013. Id. at 26. Extended Reporting Periods apply if (1) the policy were "canceled or not renewed, except for non-payment of premium, material misrepresentation, concealment or fraud, or material change in the use or extent of the risk;" (2) a covered location or covered storage tank system were deleted, sold, given away, condemned, abandoned, leased, or subleased, or (3) Defendant "renew[ed] or replace[d] the coverage of th[e] policy with insurance that has a Retroactive Date later than the date shown in the Declarations and/or in the Schedule of Covered Location(s) and Covered Storage Tank System(s) endorsement attached" to the policy. Id. at 22. None of these conditions appear in this case.

The policy excludes from coverage "pollution conditions known to exist prior to the inception of th[e] policy by" Plaintiff. Id. at 14.

d. Motions for Summary Judgment

Plaintiff sues Defendant for declaratory judgment and damages. (See generally Doc. 5). Plaintiff seeks a ruling it "provided timely notice" during the policy period and performed all conditions precedent to enforce the insurance policy (Count I). Id. at ¶¶ 43–47. Plaintiff also sues Defendant for damages related to Defendant breaching the insurance contract (Count II). Id. at ¶¶ 48–55.

Defendant moves for summary judgment, arguing it need not cover Plaintiff for the costs associated with the July 2017 Discharge Incident, given Plaintiff "was clearly aware of the pollution conditions" in 2017, but waited until 2019 before notifying Defendant and seeking coverage. (See generally Doc. 51).

Plaintiff moves for summary judgment that Defendant needs to cover Plaintiff for corrective action and defense costs associated with the July 2017 Discharge Incident. (See generally Doc. 57). Plaintiff also argues it is entitled to summary judgment on its breach of contract claim. See id. Finally, Plaintiff moves for summary judgment on some of Defendant's affirmative defenses, including whether Florida or New York law applies and whether Plaintiff misrepresented material facts in its insurance coverage application. See id.

B. Legal Standard

[4] Under Rule 56 of the Federal Rules of Civil Procedure (Rules), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quoting Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993)). "[A] mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." Kesinger ex rel. Estate of Kesinger v. Herrington, 381 F.3d 1243, 1247 (11th Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

*4 The party seeking summary judgment bears the initial burden of demonstrating to the court, by reference to the record, that there are no genuine issues of material fact to be determined at trial. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The record to be considered on a motion for summary judgment may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

When the moving party has discharged its burden, the non-moving party must point to evidence in the record to demonstrate a genuine dispute of material fact. Fed. R. Civ. P. 56(c). Substantive law determines the materiality of facts, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248, 106 S.Ct. 2505. In determining whether summary judgment is appropriate, a court "must view all evidence and make all reasonable inferences in favor of the party opposing [the motion]." Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995).

C. Discussion

a. What law should the Court apply?

[5] [6] [7] As a threshold matter, the parties disagree on what law the Court should apply when analyzing the competing motions for summary judgment. "Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (referencing Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). The prohibitions against "independent determinations by the federal courts" as promulgated in Erie "extends to the field of conflict of laws." Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). "The conflict of law rules to applied by the federal court in [Florida] must conform to those prevailing in [Florida's] state courts." Id.

[8] The Florida Supreme Court has held Florida generally "enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co., 761 So. 2d 306, 311 (Fla. 2000). In Mazzoni Farms, the court determined "a party's ability to contract against liability for past intentional torts did not raise sufficient public policy concerns to warrant rendering the choice-of-law provision unenforceable." Se. Floating Docks, Inc. v. Auto-Owners Ins. Co., 82 So. 3d 73, 80 (Fla. 2012).

[9] While Florida courts generally enforce choice of law provisions, the designated law will not govern if it "violates the public policy of the forum state." Baker v. Baker, 622 So. 2d 541, 543 (Fla. 5th DCA 1993); see also Punzi v. Shaker Advert. Agency, Inc., 601 So. 2d 599, 600 (Fla. 5th DCA 1992); Hirsch v. Hirsch, 369 So. 2d 407, 408 (Fla. 3d DCA 1979).[2] Under Florida Administrative Law, "[f]inancial responsibility mechanisms may not include choice of law and venue in favor of jurisdictions other than Florida." Fla. Admin. Code r. 62-761.420(7). Because of the federal and state regulatory schemes, Florida law must apply to the analysis. See Fla. Stat. § 403.061 (authorizing FDEP to set forth regulations to control and prohibit air and water pollution); Fla. Stat. § 376.30701(2) (allowing FDEP to promulgate rules through the FDEP secretary); see also Land O'Sun Mgmt., 961 So. 2d at 1080.

b. Whether the "pollution condition" was first discovered during the policy period?

*5 The parties both agree that for the insurance policy to apply, the "pollution conditions" had to have been first discovered during the policy period and commenced on or after the retroactive date. (See Docs. 51 at 14; 57 at 5). Plaintiff argues that the policy does not define what "first discovered" means and that the Court should determine "first discovered" means whenever Plaintiff first discovered it was legally liable, which would have been in April 2019 and therefore clearly within the coverage of the insurance policy. (See Doc. 57 at 19).

[10] [11] [12] "In Florida, insurance contracts are 'construed according to their plain meaning.' " Westchester Gen. Hosp., Inc. v. Evanston Ins. Co., 48 F.4th 1298, 1302 (11th Cir. 2022) (interpreting an insurance contract under Florida law) (quoting Garcia v. Fed. Ins. Co., 473 F.3d 1131, 1135 (11th Cir. 2006)). "When interpreting these contracts, Florida's courts read all the policy provisions in tandem to find the most reasonable and probable interpretation." Westchester Gen. Hosp., Inc., 48 F.4th at 1302. Because 'insurance coverage must be interpreted broadly and its exclusions narrowly,' ambiguities are construed against the insurer and in favor of coverage—so long as the provision at issue is ambiguous." Id. (cleaned up) (quoting Hudson v. Prudential Prop. &Cas. Ins. Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984)); see also Taurus Holdings. Inc. v. Fid. & Guar. Co., 913 So. 2d 528, 532 (Fla. 2005).

[13] [14] [15] [16] The Florida Supreme Court has "emphasized that insurance contracts are interpreted according to the plain language of the policy except 'when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.' " Taurus Holdings, Inc., 913 So. 2d at 532 (quoting State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986)). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." Hagen v. Aetna Cas. & Sur. Co., 675 So. 2d 963, 965 (Fla. 5th DCA 1996). [3]

Here, Plaintiff argues "first discovered" is ambiguous in Coverage A, which states in full:

> 1. We will pay on behalf of the **insured** those sums the **insured** becomes legally obligated to pay as damages because of **cleanup costs** in excess of the deductible, if any, resulting from **pollution conditions** on, at or under the **covered location(s)** listed in the Declarations and/or in the Schedule of Covered Location(s) and Covered Storage Tank System(s) endorsement attached to this policy which result from a **release** of contents from any **covered storage tank system(s)**, provided that the **pollution conditions** are first discovered during the policy period and reported to us in writing, during the policy period or **Extended Reporting Period**, if applicable. Such **pollution conditions** must commence on or after the Retroactive Date set forth in the Declarations and/or the Schedule of Covered Location(s) and Covered Storage Tank System(s) endorsement attached to this policy.
>
> *6 2. We will pay on behalf of the **insured** those sums the **insured** becomes legally obligated to pay as damages because of **cleanup costs** in excess of the deductible, if any, resulting from **pollution conditions** emanating from the **covered location(s)** listed in the Declarations and/or in the Schedule of Covered Location(s) and Covered Storage Tank System(s) endorsement attached to this policy which result from a **release** of contents from any **covered storage tank system(s)**, provided that the **pollution conditions** are first discovered during the policy period and reported to us in writing, during the policy period or **Extended Reporting Period**, if applicable. Such **pollution conditions** must commence on or after the Retroactive Date set forth in the Declarations and/or the Schedule of Covered Location(s) and Covered Storage Tank System(s) endorsement attached to this policy.

(Docs. 49.20 at 11; 57.4 at 10) (emphasis in original).

The phrase "first discovered" appears five times within the insurance policy. (See Doc. 49.20 at 11, 12, 21, 27). The term appears twice in Coverage A, which explains when Defendant must pay for Plaintiff's "covered storage tank system cleanup costs"; once in Coverage C, which explains when Defendant must pay for Plaintiff's "covered locations cleanup costs"; once where the insurance policy explains when and how Plaintiff must report a pollution condition due to a claim or a suit; and once in an endorsement. The endorsement rewrites one subsection of the policy explaining when and how Plaintiff must report a pollution condition. Compare Doc. 49.20 at 20–21 with Doc. 49.20 at 27. The rewrite does not substantially change the procedure Plaintiff must follow to report a pollution condition.

Specifically, under the heading "Reporting of a Pollution Condition, Claim or Suit," the insurance policy outlines how Plaintiff must notify Defendant for coverage. (Doc. 49.20 at 20–21). The policy outlines that Plaintiff "must see to it that [Defendant] is notified as soon as reasonably possible, but in any event, not more than seven (7) days after" Plaintiff first becomes "aware of, or should have become aware of[,] a pollution condition which may result in a claim or any action or proceeding to impose an obligation on [Plaintiff] for cleanup costs." Id. at 20.

The phrase "first discovered" is not ambiguous. Reading the full insurance policy, including the section titled "Reporting of a Pollution Condition, Claim or Suit," "first discovered" means when Plaintiff "first became aware of, or should have become aware of a pollution condition." This plain language reading is unambiguous and controlling over interpreting the insurance policy. See Taurus Holdings, Inc., 913 So. 2d at 532.

[17] On May 23, 2017, FDEP inspected Plaintiff's St. Augustine gas station, and directed Plaintiff to take corrective action. (See Docs. 49.2 at 4; 57.6 at 3). In taking the corrective action, by July 2017, Plaintiff knew pollution conditions existed. (See Docs. 49.2; 57.10). A representative for Plaintiff signed a Discharge Report Form indicating that gasoline and diesel was leaking and affecting the soil and groundwater. (Docs. 49.2; 57.10). When signing the DRF, Plaintiff was specifically instructed to notify Defendant about the notified discharge." (Docs. 49.2; 57.10). The DRF was filed on March 8, 2018. (Docs. 49.18 at 3; 57.12 at 2).

Three dates are at issue. First, Plaintiff identified July 2017 as the "date of discovery" on the DRF. Second, Plaintiff filed the DRF on March 8, 2018. Third, Plaintiff made a claim under the insurance policy on April 22, 2019. (Doc. 5 at ¶ 31).

It is undisputed that Plaintiff knew by March 8, 2018 that gasoline and diesel were leaking from Plaintiff's facility. Plaintiff's representative signed and submitted the DRF. (Docs. 57.10; 57.12 at 2).[4] The same representative wrote the "date of discovery" as July 2017. (Doc. 57.10). Even if that representative did not know whether pollution conditions existed in July 2017, that representative knew the pollution conditions existed on March 8, 2018, which was before the insurance policy took effect. (See Docs. 57.10; 49.20 at 8). Additionally, the policy excludes from coverage "pollution conditions known to exist [by Plaintiff] prior to the inception of th[e] policy." (Doc. 49.20 at 14). The insurance policy became effective on July 18, 2018. Id. at 8.

*7 [18] Plaintiff argues it first knew of a pollution condition on April 16, 2019 and reported its claim to Defendant on April 19, 2019. (See Docs. 65 at 14; 61.13; 49.19). Plaintiff's argument still results in summary judgment for Defendant.

The Court analyzes Plaintiff's argument starting with the argument's conclusion and going to its origin. The document Plaintiff relies on showing that the pollution condition was first discovered in April 2019 is correspondence from FDEP. (See Doc. 61.13). Within the correspondence, FDEP explains that the latest information it "received regarding conditions existing" at Plaintiff's gas station "was an August 16, 2018 Closure Assessment for Replacement of Dispenser Sump (Report), submitted by Taylor Environmental Consulting." Id. at 1.

In the Report, Taylor Environmental Consulting identified a groundwater sample that "indicated benzene, ethylbenzene, toluene, total xylenes, bromodichloromethane, and dibromochloromethane" that exceeded levels identified in the Florida Administrative Code. (Doc. 49.16 at 5).

Plaintiff had access to the Taylor Report in or about August 2018. (Doc. 49.1 at 25). Though Plaintiff had access and knew the contents of the Report, Plaintiff did not take further action to notify Defendant. Id. at 27; (see also Doc. 57.17 at 93–100).

Plaintiff argues that it could not tell whether the contaminants detailed in the Taylor Report were from a discharge in 1985 or whether the contaminants were from a new discharge. (Doc. 65 at 14). The insurance policy states Plaintiff "must" notify Defendant "as soon as reasonably possible, but in any event, not more than seven (7) days after [Plaintiff] first became aware of, or should have become aware of[,] a pollution condition which may result in a claim or any action or proceeding to impose an obligation on [Plaintiff] for cleanup costs." (Doc. 49.20 at 20) (emphasis altered).

Even if the contamination was new or related back to 1985, Plaintiff had a duty under the contract to notify Defendant within seven days of the Taylor Report. See Doc. 49.20 at 20–21. Plaintiff should have notified Defendant by August

23, 2018. Instead, Plaintiff waited until April 19, 2019 to report the contamination. Under the plain language of the insurance policy, and as a matter of law, Defendant is entitled to summary judgment. [5]

c. Whether Defendant must cover Plaintiff for "defense costs"?

[19] [20] Finally, the parties dispute whether Defendant must cover Plaintiff for defense costs. (See Docs. 51 at 24–25; 57 at 25–27). "[A] liability insurer's obligation to defend a claim made against its insured must be determined solely from allegations in the complaint." State Farm Fire and Cas. Co. v. Higgins, 788 So. 2d 992, 995 (2001). "The duty to defend arises when the complaint alleges facts that fairly and potentially brings the suit within policy coverage." Id.

Under Coverage E, Defendant agreed to

> [P]ay on behalf of [Plaintiff] those costs to defend a **claim** or **suit** for **bodily injury, property damage** or **cleanup costs** to which this insurance applies. We will have no duty to defend the **insured** against any **claim** or **suit** for **bodily injury, property damage** or **cleanup costs** to which this policy does not apply. Our duty to defend or continue defending any such **claims** or **suits** and to pay any **bodily injury, property damage, cleanup costs** or defense costs, charges and/or expenses, shall cease once the applicable Limit of Liability, as described in the Declarations and Section IV. Limits of Liability, has been exhausted.

***8** (Docs. 49.20 at 12; 57.4 at 11).

[21] For Defendant to cover Plaintiff, the policy must apply to the underlying claim. (Docs. 49.20 at 12; 57.4 at 11). As explained, Plaintiff failed to follow the insurance policy for Coverage A to apply, precluding Plaintiff from recovering under Coverage E. See Higgins, 788 So. 2d at 995.

Accordingly, after due consideration, it is

ORDERED:

1. Defendant's Motion for Final Summary Judgment (Doc. 51) is **GRANTED**.
2. Plaintiff's Amended Motion for Summary Judgment (Doc. 57) is **DENIED**.
3. The Clerk of Court shall enter judgment accordingly, terminate all pending motions, and close this file.

DONE and **ORDERED** in Jacksonville, Florida this 23rd day of June 2023.

All Citations

--- F.Supp.3d ----, 2023 WL 4227568

Footnotes

1 The Court notes that both parties submit the Discharge Report Form. (See Docs. 49.2; 57.10). The filings are identical. The Form is not dated on the line titled "Date of Form Completion." However, Taylor Environmental Consulting, hired by Plaintiff, identifies that the document was "filed on March 8, 2018." (Docs. 49.18 at 3; 57.12 at 2). Also unclear is the exact date the leak was discovered because the date has a scribble in the day section. All that is discernable is that it was "discovered" on some day in July 2017.

2 Defendant argues that Florida courts have held that New York choice of law provisions are enforceable in Florida environmental insurance policies. (Doc. 51 at 13) (citing Land O'Sun Mgmt. v. Com. & Indust. Inc. Co., 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007)). To be clear, the Florida appellate court explained that the Florida "legislature has not specifically addressed forum selection clauses contained in environmental insurance policies; however [the legislature] has determined that the Office of Insurance Regulation must review and approve insurance policies drafted by insurance companies doing business in Florida." Land O'Sun Mgmt., 961 So. 2d at 1080 (referencing Fla. Stat. §§ 624.401; 627.410(1)). In Land O'Sun Mgmt., the court concluded that because the policy at issue had indeed been "reviewed and approved by the Office of Insurance Regulation, it cannot be said that the [choice of law] clause violates strong public policy[.]" Id. Unlike in Land O'Sun Mgmt., neither party presents any argument showing that the policy at issue has been reviewed and approved by Florida authorities. Defendant provides further unanalogous case law in its sur-reply. (See Doc. 77) (citing Great Am. Fid. Ins. Co. v. JWR Const. Servs., Inc., 882 F. Supp. 2d 1340, 1350 (S.D. Fla. 2012)) (upholding a New York choice of law provision because "all parties concede that New York law is applicable"); Gilman + Ciocia, Inc. v. Wetherald, 885 So. 2d 900 (Fla. 4th DCA 2004) (evaluating a choice of law provision in an employment agreement). Here, the parties neither agree nor concede that New York Law applies. Nor has Defendant shown this case is analogous to Land O'Sun Mgmt. in that its contract has been approved by the proper Florida authorities.

3 Even if the Court had concluded that New York law applied to the analysis of this case, the outcome would be the same. Under New York law, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." Vill. of Sylvan Beach v. Travelers Indem. Co., 55 F.3d 114, 115 (2d Cir. 1995). A court may determine if an ambiguity exists by asking "whether, affording a fair meaning to all of the language employed by the parties in the contract and leaving no provision without force and effect ... there is a reasonable basis for a difference of opinion as to the meaning of the policy." Fed. Ins. Co. v. Int'l Bus.Machs. Corp., 18 N.Y.3d 642, 646, 942 N.Y.S.2d 432, 965 N.E.2d 934 (2012).

4 The DRF was filled out by Robert Maley. (Doc. 49.1 at 19–20). Robert Maley is Plaintiff's principal and owned the gas station at issue. (Docs. 49.1 at 16, 49.12 at 3).

5 Just as Defendant is entitled to summary judgment, Plaintiff's claim for breach of contract fails. (See Doc. 57 at 24–25). Defendant did not breach the insurance contract because Plaintiff failed to timely notify Defendant according to the policy.

End of Document