

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERA FRANCHISE SYSTEMS, LLC,

Plaintiff and Counterdefendant,

v.

HOPPENS REALTY, INC., f/d/b/a ERA
HOPPENS REALTY GROUP and
MICHAEL S. HOPPENS, an individual,

Defendants and Counterplaintiffs,

and

WILSON MUTUAL INSURANCE COMPANY,

Intervenor.

OPINION AND ORDER

12-cv-594-slc

This is a civil dispute between ERA Franchise Systems, LLC, and its former franchisee, Hoppens Realty, Inc., which is owned by defendant Michael S. Hoppens (collectively, “Hoppens”). In a civil complaint filed August 16, 2012, ERA alleges that Hoppens breached their franchise agreement with ERA by failing to report transactions and pay royalties and continued to use ERA’s trademarks after ERA terminated the franchise agreement. ERA asserts claims for trademark violations, unfair competition, breach of contract and other state law claims. On December 5, 2012, this court granted the motion of Hoppens’s insurer, Wilson Mutual Insurance Company, to intervene for the purpose of obtaining a declaration that it has no duty to defend or indemnify Hoppens against ERA’s allegations in this case.

Now before the court is Wilson Mutual’s motion for summary judgment on its claim that it has no duty to defend or indemnify Hoppens.¹ Dkt. 38. Hoppens has not responded to the motion; accordingly, Wilson Mutual’s proposed facts, dkt. 40, are accepted as undisputed.

¹ Also pending are ERA’s motions for judgment on the pleadings on Hoppens’ counterclaim, dkt. 38, and for leave to file a belated motion for summary judgment on Counts V and VI of its complaint, dkt. 46. The court expects to rule on these motions in separate orders by the end of this month.

Procedure to be Followed on Motions for Summary Judgment, II.C. (“Unless the responding party puts into dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed.”).

An insurer’s duty to defend is determined by examining the four corners of the complaint and comparing the allegations to the terms of the insurance policy. *Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W. 2d 666. When conducting this analysis, “the allegations in the complaint are construed liberally,” “all reasonable inferences in the allegations of a complaint” must be assumed, and “any doubt regarding the duty to defend [must be resolved] in favor of the insured.” *Id.* at ¶ 20. Even if the allegations are “utterly specious,” the insurer must defend the suit so long as there would be coverage in the event the allegations were proven. *Smith v. Katz*, 226 Wis.2d 798, 807, 595 N.W.2d 345 (1999).

The duty to defend is broader than the duty to indemnify. Therefore, if there is no duty to defend, there is likewise no duty to indemnify. *General Casualty Co. of Wis. v. Hills*, 209 Wis. 2d 167, 176, 561 N.W. 2d 718 (1997).

Wilson Mutual contends that it has no duty to defend Hoppens in this case because it is undisputed that ERA is named as an additional insured in the policy issued to Hoppens and the policy’s cross-liability provision specifically excludes coverage for damage to an insured.² Hoppens offers no argument in opposition, which is logical; what *could* he argue in light of the

² In the alternative, Wilson Mutual contends that it has no duty to defend because: 1) ERA’s requested damages for Hoppens’ breach of the franchise agreement and unauthorized use of their trademarks are not “property damage” or “bodily injury” under the initial grant of coverage in the commercial general liability policy; and 2) ERA’s claims do not trigger the personal and advertising injury coverage. It is unnecessary to reach these issues because there is no dispute that ERA’s claims against Hoppens are excluded under the cross-liability provision.

plain terms of the policy? The undisputed facts show that Wilson Mutual is entitled to judgment as a matter of law on its claim that it has no duty to defend or indemnify Hoppens Realty, Inc. or Michael S. Hoppens in this case.

ORDER

It is ORDERED that intervenor defendant Wilson Mutual Insurance Company's motion for summary judgment, dkt. 38, is GRANTED.

Entered this 19th day of June, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge