JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 15-2443 JGB (KKx)**	Date	January 7, 2016
Title	***The Citrus Course Homeowners Association v. Great American Insurance Company***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING Defendant's Motion to Dismiss (Doc. No. 6); and (2) VACATING the January 11, 2015 Hearing (IN CHAMBERS)

Before the Court is Defendant Great American Insurance Company's Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 6.) The Court finds this matter appropriate for resolution without a hearing. Fed. R. Civ. P. 78; L.R. 7-15. After consideration of the papers submitted in support of and in opposition to the motion, the Court GRANTS the motion. The January 11, 2016 hearing is VACATED.

I. BACKGROUND

A. Procedural Background

On November 5, 2015, Plaintiff the Citrus Course Homeowners Association ("Plaintiff" or the "HOA") filed a complaint in Riverside County Superior Court against Defendant Great American Insurance Company ("Defendant" or "Great American") and fictitious Defendants 1 through 20. ("Complaint," Doc. No. 1-1.) On November 30, 2015, Defendant removed the action to this Court. ("Notice of Removal," Doc. No. 1.) The Complaint alleges causes of action for breach of contract and declaratory relief arising out of the Directors and Officers Liability Insurance Policies that Great American issued to the HOA from 2009 through 2012. (Complaint ¶¶ 7-9.)

On December 4, 2015, Defendant filed a motion to dismiss the Complaint. ("Motion," Doc. No. 6.) In support of the motion to dismiss, Defendant filed a Request for Judicial Notice, ("RJN I," Doc. No. 9), the Declaration of Patrick Bollig, ("Bollig Decl.," Doc. No. 7), and the Declaration of Michael Powell, ("Powell Decl.," Doc. No. 9). On December 21, 2015, Plaintiff filed an opposition, ("Opp'n," Doc. No. 15), and on December 28, 2015, Defendant filed a reply

memorandum, ("Reply," Doc. No. 17). In support of the reply memorandum, Defendant filed another Request for Judicial Notice. ("RJN II," Doc. No. 17.)

B. Factual Allegations

Plaintiff is a homeowners association in the City of La Quinta in Riverside County. (Complaint ¶ 1.) Defendant is an insurance company organized under the laws of Ohio and authorized to do business in California. (Id. ¶ 2.)

On May 19, 2009, Defendant issued Plaintiff a Directors and Officers Liability Insurance Policy, Policy No. EPP7932684, which insured the HOA from claims initiated against it for a period of one year. (See "2009-2010 Policy," Policy No. EPP7932684-02, Ex. 1 to Complaint.) This policy was subsequently renewed for two additional one-year periods. (See "2010-2011 Renewal Application," Ex. 2 to Complaint; "2011-2012 Renewal Application," Ex. 3 to Complaint; and the "2010-2011 Policy," Policy No. EPP7932684-03,[1] Bollig Decl., Ex. 1.)

On April 13, 2011, Citrus El Dorado, LLC ("El Dorado") filed a complaint against Plaintiff in Riverside County Superior Court – Citrus El Dorado LLC v. Citrus Course Homeowners Association, Case No. INC 1103055, (the "El Dorado action"). El Dorado had been developing residential homes on property annexed by the HOA, however it encountered difficulties with its construction lender and stopped paying its assessments to the HOA. (See "March 8, 2012 Tender Letter," Ex. 4 to Complaint.) The HOA then initiated nonjudicial foreclosure proceedings against the annexed property, which prompted El Dorado to file a complaint in state court and seek a temporary restraining order to enjoin the foreclosure proceedings. (Id.) El Dorado's complaint sought declaratory relief regarding the initiation of foreclosure sales. (See "April 13, 2011 El Dorado Complaint,"[2] Doc. No. 9-1.) The HOA appeared in the action on April 29, 2011 and filed an opposition that same day to El Dorado's application for a temporary restraining order. (See Exs. 2 and 3 to RJN I, Doc. Nos. 9-2 and 9-3.) On May 19, 2011, El Dorado filed an amended complaint, which added causes of action for breach of contract, unjust enrichment, conversion, and declaratory relief. (See Ex. 1 to RJN II, Doc. No. 17-1.)

[1] Although the 2010-2011 Policy is not attached to the Complaint, it is referenced in paragraph 8 of the Complaint and Plaintiff does not dispute its authenticity. Accordingly, the Court finds that the 2010-2011 Policy is incorporated by reference into the Complaint. See Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1160 (9th Cir. 2012) (documents are judicially noticeable under the "incorporation by reference" doctrine if their content is referenced in the complaint and their authenticity is not in dispute); see also Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (doctrine of incorporation by reference extends to documents "not physically attached to the pleading").

[2] The Court takes judicial notice of the El Dorado action. See Rosales-Martinez v. Palmer, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that [courts] may take judicial notice of judicial proceedings in other courts"). This includes the initial complaint filed on April 13, 2011, (Ex. 1 to RJN I, Doc. No. 9-1), the amended complaint filed on May 19, 2011, (Ex. 1 to RJN II ,Doc. No. 17-1), the appearance by Plaintiff in that action, (Ex. 2 to RJN I, Doc. No. 9-2), and the opposition to El Dorado's application for a temporary restraining order Plaintiff filed on April 29, 2011, (Ex. 3 to RJN I, Doc. No. 9-3).

The HOA did not tender the El Dorado action to Great American until March 8, 2012, during the third period of coverage. (Complaint ¶ 10; see also March 8, 2012 Tender Letter, Ex. 4 to Complaint.) On March 28, 2012, Great American rejected the tender on the grounds that the HOA failed to satisfy a condition precedent to coverage, namely the requirement that the HOA give notice in writing to Great American of a claim no later than ninety days after the end of a policy period. (Tender Rejection Letter, Ex. 5 to Complaint.) Specifically, Great American stated that the policy period in question was the period from May 19, 2010 to May 19, 2011. (Id.) This is because the El Dorado action was filed on April 13, 2011, and the HOA had notice of it at least by April 29, 2011, which was within the 2010-2011 Policy period. (Id.) Accordingly, because the HOA did not notify Great American of its claim within ninety days of May 19, 2011, there is no coverage for the claim under the policy. (Id.) Plaintiff alleges that Great American breached the insurance contracts by failing to provide a defense to the El Dorado action and asserts that the HOA "performed all of its material obligations under the Insurance Contract and/or was excused from performance of its material obligations…" (Complaint ¶¶ 13, 14.)

The El Dorado action remains pending and has not been finally adjudicated. (Complaint ¶ 17.) Plaintiff states it has incurred $414,321.91 to date in fees and costs defending the El Dorado action, with future costs expected. (Id. ¶ 18.)

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. at 545.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops

short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing the party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. DISCUSSION

Great American argues that the HOA's Complaint must be dismissed with prejudice because under the clear language of the insurance policy, the HOA cannot plead any facts which would establish coverage for the El Dorado action. (Motion at 5, Reply at 3.) The HOA disputes this assertion. It argues first that the allegation in the Complaint that the HOA complied with all material obligations under the insurance policy is sufficient to survive a motion to dismiss notwithstanding any documents attached to the Complaint or incorporated by reference therein. (Opp'n at 3-4.) Alternatively, the HOA seeks permission to amend its Complaint to include allegations that it did satisfy the notice requirements of the insurance policy, albeit of the 2011-2012 Policy, when it notified Great American of the El Dorado action on March 8, 2012, because the HOA reasonably believed that the action fell under the policies' "contract exclusion" clause up to and until it received a settlement demand from El Dorado in February 2012 indicating otherwise, and upon receipt of which the HOA immediately tendered the action to Great American. (Id. at 5.) Finally, if the Court finds that the HOA did not comply with the notice provision, Plaintiff asks the Court to "utilize equity to prevent a forfeiture of Plaintiff's rights under the insurance policy" and excuse Plaintiff's "technical noncompliance with the notice provision." (Id. at 7-8.) The Court first reproduces pertinent excerpts from the 2010-2011 Policy and then discusses each party's arguments.

A. The Policy

The following are relevant excerpts from the 2010-2011 Policy. The policy's insuring agreement, which defines Great American's payment obligation, commits Great American to pay as follows:

> If during the **Policy Period**… any **Claim** is first made against an **Insured** for a **Wrongful Act**… the **Insurer** shall pay on their behalf **Loss** resulting from such **Claim**. The **Insurer** has the right and duty to defend any **Claim** to which this insurance applies, even if the allegations of the **Claim** are groundless, false or fraudulent.

(2010-2011 Policy § I.)

Policy Period is defined as "the period from the inception of this Policy to the Policy expiration date stated in Item 2 of the Declarations or its earlier termination, if any. (Id. § III.J.) Item 2 of the Declarations defines the Policy Period as beginning on May 19, 2010 and ending on May 19, 2011. (Doc. No. 7-1 at 2.) **Claim** is defined as "(1) any proceeding initiated against

an Insured, including any appeals therefrom, before (a) any governmental body which is legally authorized to render an enforceable judgment or order for money damages or other relief against such insured…" (2010-2011 Policy § III.K.) The policy defines **Wrongful Act** as "any actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty…" (Id. § III.E.)

Loss, as modified by amendment, is defined as:

> **Loss** shall mean settlements and judgments, including punitive or exemplary damages or the multiple portion of any multiplied damage award, and subject to the provisions of Section V and VI, **Costs of Defense** incurred by the Insured, provided always, however, that Loss shall not include taxes, criminal or civil fines or penalties imposed by law, or any matter which may be deemed uninsurable under the law pursuant to which this Policy shall be construed. It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

(Amendment to Section III.G, Doc. No. 7-1 at 7.) **Costs of Defense** are "any reasonable and necessary legal fees and expenses incurred in defense of any claim and appeals therefrom, and cost of attachment or similar bonds…" (2010-2011 Policy § III.H.)

Further, the policy requires insureds to notify Great American of any claim as follows:

> The Insureds shall, as a condition precedent of their rights under this Policy, give the Insurer notice in writing of any claim made, as soon as practicable from the date the Chairman, President, Executive Director, Chief Financial Officer, General Counsel or equivalent has knowledge of the Claim, and in no event later than ninety (90) days after the end of the Policy Period.

(Amendment to Section VIII.9, Doc. No. 7-1 at 6, emphasis added.) Additionally, the policy limits Great American's liability to the extent that:

> More than one Claim involving the same Wrongful Act or Related Wrongful Acts of one or more Insureds shall be considered a single claim, and only one Retention shall be applicable to such a single Claim. All such Claims, constituting a single Claim, shall be deemed to have been made on the earlier of the following dates: (1) the earliest date on which any such Claim was made; or (2) the earliest date on which any such Wrongful Act or Related Wrongful Act was reported under this Policy or any other policy providing similar coverage.

(2010-2011 Policy § V.B.) Finally, the only policy exclusion relevant to this case is the Contract Exclusion, which, as modified by amendment, states:

> This Policy does not apply to any claim made against any Insured:

> I. for any actual or alleged liability of any Insured under any contract or agreement, express or implied, written or oral; provided however this exclusion shall not apply to:
>
> (1) Costs of Defense, or
> (2) employment related obligations which would have attached absent such contract or agreement.

(Amendment to Section IV.I, Doc. No. 7-1 at 10.)

B. There is No Coverage for the El Dorado Action

Under California law, a contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. Cal. Civ. Code § 1636. The intention of the parties is to be ascertained from the language of the contract: if the language is clear and explicit, it governs. Cal. Civ. Code § 1638; see also Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992). If language in an insurance contract is ambiguous, it must be interpreted as the insurer reasonably believed the insured understood it at the time the insurance contract was made. AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 823 (1990). If doing so does not resolve the ambiguity, then the language is interpreted against the insurer. Id. at 822. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Cal. Civ. Code § 1641. For reasons explained below, the Court does not find the language in the insurance contract at issue to be ambiguous; rather, the contract is clear and explicit.

The El Dorado action was filed on April 13, 2011, and the HOA had notice of it at least by April 29, 2011, when it made its first appearance. This was within the 2010-2011 Policy Period. (2010-2011 Policy, Declarations, Item 2.) The amended complaint was filed on May 19, 2011—the first day of the 2011-2012 Policy Period. However, the date of the amended complaint is immaterial because according to the terms of the policy, all claims involving the same wrongful act or related wrongful acts shall be considered a single claim and shall be deemed to have been first made on the earliest date on which it was made to the insured. (See 2010-2011 Policy § V.B.) Although the initial complaint is considerably shorter than the amended complaint, both contain allegations regarding the same set of material facts: namely, that the HOA breached a property annexation agreement with El Dorado, which caused El Dorado damages. (Compare RJN I, Ex. 1 with RJN II Ex. 1.) Both pleadings reference the same property, the same parties, and the same alleged misconduct; the amended complaint simply provides further detail and adds causes of action which are supported by the same set of operative facts. Accordingly, the El Dorado action is deemed to have been made at the latest on April 29, 2011.

This is similar to Informix Corp. v. Lloyd's of London, No. C-91-1506-FMS, 1992 U.S. Dist. LEXIS 16836 (N.D. Cal. 1992), in which the court found that an amended complaint – which was filed against an insured during a one-year policy period of a "claims made" policy similar to the one at issue here – did not constitute a "claim first made" during the that policy period, but rather the claim was "first made" for purposes of coverage when the first complaint was filed—which occurred in a previous policy period. Like Informix, the new allegations in the amended complaint in the El Dorado action did not constitute new "claims" under the policy,

because the amended complaint is part of the same claim initiated by the filing of the original complaint—which occurred within the 2010-2011 Policy Period.

Because the El Dorado action is deemed to have been "first made" in the 2010-2011 Policy Period, a condition precedent to coverage is the requirement that the HOA notify Great American in writing of the claim made against it within ninety days of the expiration of the policy period. (2010-2011 Policy, Amendment to § VII.A.) Here, the policy period expired on May 19, 2011. (Id., Declarations, Item 2.) As such, written notice was due at the latest by August 17, 2011. However, Plaintiff did not tender the action to Great American until March 8, 2012—almost seven months later. (March 8, 2012 Tender Letter, Ex. 4 to Complaint.) Accordingly, the HOA did not satisfy the notice requirement of the policy,[3] and the El Dorado action is not covered by the 2010-2011 Policy. See World Health & Educ. Foundation v. Carolina Casualty Ins. Co., 612 F. Supp. 2d. 1089, 1096 (N.D. Cal. 2009) (granting an insurer's motion to dismiss where the insured provided notice of a claim 24 days after the expiration of the policy period, noting that "if a claim is not timely reported during a policy period, the insured is not covered simply because it has a subsequent policy"); see also PCCP LLC v. Endurance Am. Specialty Ins. Co., No. 12-CV-0447 YGR, 2013 U.S. Dist. LEXIS 114400, at *24 (N.D. Cal. Aug. 13, 2013) (granting a motion for summary judgment to an insurer where the insured made a claim under a "claims made" policy after the expiration of the policy period).

C. Amendment Would be Futile

The HOA requests leave to amend in order to explain why it believes that the El Dorado action was not covered by the policy at the outset, but rather coverage inured later, and therefore, its notice to Great American was timely under the 2011-2012 Policy. (Opp'n at 4.) Specifically, the HOA argues that whether the action was first made in the 2010-2011 Policy Period is immaterial because it was not actually a covered "Claim" during that policy period. (Id.) At the time both the initial and amended complaints were filed, the HOA argues the action was solely a

[3] Plaintiff argues that because the Complaint expressly alleges that the HOA complied with all material allegations under the insurance policy, the Court should not look "outside the four corners of the Complaint" and should deny Defendant's motion to dismiss. (Opp'n at 4.) Although generally the Court will accept as true the factual allegations in a complaint, the Court "need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." Gonzalez v. Planned Parenthood of Los Angeles, 759 F.3d 1112, 1115 (9th Cir. 2014); see also Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295–96 (9th Cir. 1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Here, Plaintiff's allegations that it "performed all of its material obligations under the Insurance Contract and/or was excused from performance of its material obligations under the Insurance Contract," (Complaint ¶ 14), is belied by Plaintiff's admission that it did not give notice to Great American of the El Dorado action – which was filed on April 13, 2011 and which the HOA has notice of at least by April 29, 2011, (RJN I, Exs. 1-3) – until March 8, 2012, (id. ¶ 10; see also March 8, 2012 Tender Letter, Ex. 4 to Complaint), almost seven months after the notice period expired, (see 2010-2011 Policy, Amendment to § VII.A and Declarations, Item 2). Accordingly, the Court will not accept as true the allegation that Plaintiff complied with all material obligations under the policy.

dispute sounding in contract and as such was excluded from coverage pursuant to the policy's Contract Exclusion clause. (Id. at 5.) Rather, the HOA posits, it was not until February 2012 that the nature of the El Dorado action changed such that the Contract Exclusion clause no longer applied. (Id.) It was at that time that the HOA received a settlement demand from El Dorado that, for the first time, sought damages for "extra-contractual assertions, including a non-disclosure tort and other tort-based calculations of damages." (Id.) Accordingly, Plaintiff claims its March 8, 2012 tender letter to Great American satisfied the notice requirements of the 2011-2012 Policy, and it should be permitted an opportunity to amend the Complaint to allege these additional facts. (Id. at 5-6.)

Plaintiff's proposed amendment is futile. First, the amended complaint in the El Dorado action contained a cause of action for conversion—a tort—making Plaintiff's argument that the action suddenly became a tort matter eight or nine months after the filing of the amended complaint dubious. (See RJN, Ex. 1.) Second, the citation by Plaintiff to the Policy fails to take into account the amendment to the Contract Exclusion clause. The Contract Exclusion clause, as amended, specifically states that the exclusion does not apply to Costs of Defense. (2010-2011 Policy, Amendment to Section IV.I.) The only enumerated damages sought by Plaintiff in the Complaint are the $414,321.91 in fees and costs expended thus far defending the El Dorado action, with future costs anticipated. (Complaint ¶ 18.) Therefore even if damages awarded against the HOA in the El Dorado action are not covered under the policy – a dubious assertion at best – certainly the cost of defending the El Dorado action constitutes a "Loss" which would have been covered under the 2010-2011 Policy. (See 2010-2011 Policy, Amendment to § III.G.) Therefore, the El Dorado action was a covered "Claim" during the 2010-2011 Policy Period not subject to exclusion and Plaintiff's proposed amendments would be futile.

D. The Court Will Not Excuse Plaintiff's Noncompliance

Plaintiff requests that, if the Court finds Plaintiff failed to comply with the notice condition of the policy, the Court "utilize equity to prevent a forfeiture of Plaintiff's rights under the insurance policy. (Opp'n at 8.) Specifically, Plaintiff seeks to be excused from being "technically noncompliant with the policy." (Id.) In support of its request, Plaintiff cites Root v. American Equity Specialty Ins. Co., 130 Cal. App. 4th 926, 929 (2005). In Root, an attorney with a "claims made" malpractice insurance policy had a claim made against him—specifically, a malpractice lawsuit was filed on the last day of his insurance policy period. 130 Cal. App. 4th at 930. The attorney was notified that day, not by service of the complaint upon him, but from a phone call from a journalist seeking the attorney's reaction to the filing of the lawsuit. Id. Thinking the phone call was a prank, the attorney left for a weekend vacation only to return to find that the claim was in fact legitimate. Id. The attorney immediately notified his insurer of the claim—two days after the expiration of the policy period. Id. at 931. The insurance company denied the claim on the grounds that it was not timely reported. Id. The California Court of Appeal found that the journalist's phone call constituted a "claim made" within the policy period, id. at 933, yet the court equitably excused the attorney from the condition precedent of notifying the insurer of the claim within the policy period because to hold otherwise would "work[] a forfeiture," id. at 948.

Plaintiff argues that its situation is comparable to that of the attorney in Root. (Opp'n at 8.) The Court disagrees. Root took great pains to limit the reach of its holding to the facts of that case. Indeed, the court explicitly posited that had the attorney been given an extra sixty days beyond the expiration of the policy period to report any claims made, the result may have been different. 130 Cal. App. 4th at 948. By contrast, the HOA was given an extra ninety days to report the El Dorado action, yet did not report it until almost seven months after the expiration of the grace period. (See 2010-2011 Policy, Amendment to § VII.A; March 8, 2012 Tender Letter, Ex. 4 to Complaint.) Further, Root was particularly concerned with the short duration of time between the notice to the attorney of the possibility of a claim against him and the expiration of the policy period—less than a single day. 130 Cal. App. 4th at 948. The court posited that had the attorney had sufficient time to conduct an investigation as to whether a claim had indeed been made against him, or, had he delayed reporting the claim beyond the day on which he received confirmation of the claim, the result might have been different. Id. Here, the HOA had unequivocal notice that a claim was made against it by April 29, 2011, when it appeared in the El Dorado action and filed an opposition to an ex parte application, yet it did not report the claim to Great American until March 8, 2012. The Court finds this delay of over eight months inexcusable and as such declines to equitably excuse the condition precedent to coverage.

IV. CONCLUSION

The Court concludes that no coverage for the El Dorado action exists under the insurance policies issued by Defendant to Plaintiff and that no amendment to the Complaint could establish such coverage. As such, the Court GRANTS Defendant's Motion to Dismiss the Complaint and DISMISSES the Complaint WITH PREJUDICE. The January 11, 2016 hearing is VACATED.

IT IS SO ORDERED.