

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

July 10, 2017

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

COLONY INSURANCE COMPANY,

Plaintiff - Appellant/Cross-Appellee,

v.

EXPERT GROUP INTERNATIONAL
INC., d/b/a Expert Au Pair; GO AU PAIR
OPERATIONS, LLC, d/b/a American
Cultural Exchange,

Defendants - Appellees/Cross-
Appellants,

and

AU PAIR INTERNATIONAL, INC.

Defendant.

Nos. 17-1188 & 17-1208
(D.C. No. 1:15-CV-02499-RPM)
(D. Colo.)

ORDER

Before **KELLY, HARTZ**, and **BACHARACH**, Circuit Judges.

Colony Insurance Company issued professional liability policies to three entities: Expert Au Pair, Go Au Pair, and Au Pair International (the Insureds). It filed the underlying suit seeking a declaration that it has no duty to defend or indemnify the Insureds in *Beltran, et al. v. Interexchange, Inc., et al.*, D. Colo. No. 14-CV-3074-CMA-KMT, a separate civil action involving antitrust and other federal claims and a number of state law claims. The *Beltran* action is ongoing and Colony has been funding the

Insureds' defense. Thus, in connection with a declaratory judgment, Colony also sought to recover the attorneys' fees and costs it has incurred defending the Insureds.

In an order entered on May 17, 2017, the district court determined that the insurance policies at issue do not provide coverage for the antitrust claim. Because this was the only claim asserted against Au Pair International in *Beltran*, the district court declared that Colony does not have a duty to defend or indemnify Au Pair International. But the court concluded it does have a duty to defend Expert Au Pair and Go Au Pair against the other claims asserted in the *Beltran* action. The court stated that it would enter final judgment against Au Pair International after it determined the amount of attorneys' fees and costs Colony was entitled to recover from that insured for defending it in the *Beltran* action. The court also stated that a determination regarding Colony's duty to indemnify Expert Au Pair and Go Au Pair must await the conclusion of the *Beltran* action, because policy exclusions might significantly limit the duty to indemnify depending on the judgment obtained in *Beltran*.

Colony seeks to appeal the district court's determination that it has a duty to continue to defend Expert Au Pair and Go Au Pair. Arguing that Colony's appeal is premature because the district court has not yet entered a final decision, Expert Au Pair and Go Au Pair filed a protective cross-appeal from the district court's decision that there is no duty to defend against the antitrust claim.

Except in certain circumstances not present here, this court's appellate jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the

judgment.” *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204 (1999). Generally, a final decision “must reflect the termination of all matters as to all parties and causes of action.” *Montez v. Hickenlooper*, 640 F.3d 1126, 1132 (10th Cir. 2011) (internal quotations omitted); *see also* Fed. R. Civ. P. 54(b) (addressing finality in an action involving multiple claims and/or multiple parties).

The district court’s May 17, 2017 order is not a final decision. Colony’s request to recover attorneys’ fees and costs incurred in defending Au Pair International is a request for compensatory damages and, as such, is part of the merits of Colony’s case. *See N. Am. Spec. Ins. Co. v. Corr. Med. Servs., Inc.*, 527 F.3d 1033, 1038-39 (10th Cir. 2008) (in declaratory judgment action, order finding insurer liable for defense fees and costs but not determining amount was not a final decision). The district court has not finally resolved the amount of defense costs Colony is entitled to recover from Au Pair International. Nor has it resolved Colony’s request for a declaration that it has no duty to indemnify Expert Au Pair and Go Au Pair for any judgment obtained against them in *Beltran*.

Because the district court has not entered a final decision in this case, we lack jurisdiction to consider these appeals. APPEALS DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Jane K. Castro
Counsel to the Clerk