IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

ERIN ALTMAN, Plaintiff, v. ARCH INSURANCE COMPANY, VETERANS EMPOWERMENT ORGANIZATION OF GEORGIA, INC., and EDWARD DAVIS Defendants.	)	Civil Action No.: 21-C-02854-S1

DEFENDANT ARCH INSURANCE COMPANY'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Arch Insurance Company ("Arch") files its Reply in Support of Its Motion to Dismiss, showing the Court as follows:

A. Plaintiff Erin Altman has failed to carry her burden of establishing that she has standing to bring a direct action against Arch.

Arch's motion to dismiss pursuant to O.C.G.A. §9-11-12(b)(1) based on Plaintiff Erin Altman's lack of standing to assert a direct action against Arch is properly before the Court. *See Auto-Owners Ins. Co. v. Tracy*, 344 Ga. App. 53 (2017) (reversing denial of motion to dismiss based on no right of direct action); *Richards v. State Farm Mut. Automobile Ins. Co.*, 252 Ga. App. 45 (2001) (affirming grant of motion to dismiss based on lack of standing because no right of direct action existed).

> "A motion to dismiss for lack of subject matter jurisdiction under OCGA § 9-11-12 (b) (1) can allege either a facial challenge, in which the court accepts as true the allegations on the face of the complaint ... or a factual challenge, which requires consideration of evidence beyond the face of the complaint...." (Citations and punctuation omitted.) *Bobick v. Community & Southern Bank*, 321 Ga.App. 855, 860 (3), n. 4, 743 S.E.2d 518 (2013).

Douglas County v. Hamilton State Bank, 340 Ga .App. 801, 801 (2017) (emphasis added). Ms. Altman has the burden of establishing that she has standing to assert a direct action against Arch and that the Court has subject matter jurisdiction. *Id*.

Ms. Altman contends that because she has a statutory right to assert a direct action against Arch, the question of whether the Court has subject matter jurisdiction is a factual question relating to the merits of her claim; however, the case law she cites does not support that contention, and she bears the burden of establishing that she has standing to assert a direct action against Arch. *See Center for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App. 762 (2013) ("[A] plaintiff must demonstrate standing separately for each form of relief sought") (quoting *Friends of the Earth v. Laidlaw Environmental Svcs*., 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Plaintiff cites *Sapp v. Canal Ins. Co.*, 288 Ga. 681 (2011), but that case involved a declaratory judgment action brought by an insurer to determine whether its policy provided coverage for the liability of its insured. The issue in *Stubbs Oil Co., Inc. v. Price*, 357 Ga. App. 606 (2020) was not whether the insured was a motor carrier, but was whether it was the statutory employer of the alleged tortfeasor, a motor carrier, so that it could be held vicariously liable under the Federal Motor Carrier Safety Regulations. That the insurer in *Smith v. S. Gen. Ins. Co.*, 222 Ga. App. 582 (1996) chose to raise the issue at the summary judgment stage rather than on a motion to dismiss does not establish that the issue of whether an insurer is subject to a direct action goes to the merits of the claim and not to the question of subject matter jurisdiction. In contrast, whether an injured party has a direct right of action against an insurer of a third-party is dependent on whether the injured party has standing, *i.e.*, whether the court has subject matter jurisdiction. *See U-Haul Company of Arizona v. Rutland*, 348 Ga. App. 738 (2019) (holding plaintiff did not have standing to pursue a declaratory judgment against insurer of the alleged tortfeasor and affirming grant of the insurer's

motion to dismiss); *Atlantic Specialty Ins. Co. v. Lewis*, 341 Ga. App. 838 (2017) (affirming grant of motion to dismiss because plaintiff lacked standing to bring a direct action against the insurer). Whether taken up via a motion to dismiss or a motion for summary judgment, the resolution of whether a plaintiff has standing does not go to the merits of the plaintiff's claims.

As conceded by Ms. Altman, a plaintiff does not have standing to bring a direct action against an insurer if the plaintiff is not a party to the insurance contract unless the right of a direct action is specifically authorized by statute. *See, e.g.*, *Richards v. State Farm Mut. Automobile Ins. Co.*, 252 Ga. App. 45 (2001). "Because the direct action statute is in derogation of the common law, [] the terms of that statute must be strictly construed[.]" *RLI Ins. Co. v. Duncan*, 345 Ga. App. 876, 878 (2018) (quoting *Jackson v. Sluder*, 256 Ga. App. 812, 818 (2002)).

1. Ms. Altman does not have a right to bring a direct action against Arch as the excess insurer of VEO.

Arch issued primary business auto liability policy, Policy No. AAAUT0046602, to VEO providing primary coverage up to a Combined Single Limit – Each Accident of $1,000,000. Arch also issued a commercial excess liability policy, Policy No. AAFXS0046602, to VEO providing coverage in excess of the primary commercial auto liability policy up to an Each Occurrence limit of $4,000,000.00.

Excess carriers are not subject to direct actions by third-parties under the direct action statutes. *See RLI Insurance v. Duncan*, 345 Ga. App. 876 (2018) (affirming grant of motion to dismiss because excess insurer not subject to direct action statute); *Werner Enters. Inc. v. Stanton*, 302 Ga. App. 25 (2010) (reversing denial of summary judgment because a direct action against an excess insurer was not authorized by the direct action statute); *Jackson v. Sluder*, 256 Ga. App. 812 (2002) (concluding that under a prior version of the direct action statute, "[n]othing in the statute mentions any other insurance or provides authorization for suit against the excess insurer.

Under the guise of construing a statute, we are not at liberty to rewrite it. Moreover, excess insurance coverage is not regarded as collectible insurance until the limit of liability of the primary policy is exhausted."); *Hammond v. Gray Transportation*, 371 F. Supp.3d 1340 (2019) (finding that insurer who had an excess indemnity agreement and filed a surety bond for a motor carrier was not subject to a direct action under O.C.G.A. §§ 40-1-112 and 40-2-140). Ms. Altman tacitly admits that she cannot assert a direct action against Arch under the excess policy it issued, as she only argues that she has a direct right of action based upon the primary policy it issued.

Based on the forgoing, the Court does not have subject matter jurisdiction over any claim asserted against Arch with respect to the excess policy it issued to VEO.

2. Only insurers of motor carriers for-hire are subject to a direct action under O.C.G.A. § 40-2-140.

Ms. Altman argues strenuously that the direct action rights under O.C.G.A. § 40-2-140 are triggered because Arch's insured, Veterans Empowerment Organization of Georgia, Inc. ("VEO"), qualifies as a motor carrier because the vehicle at issue has a Gross Vehicle Weight Rating ("GVWR") of 10,001 pounds or greater. Aside from ignoring that the insurance requirements of O.C.G.A. § 40-2-140(d) only apply to motor carrier's for hire, Ms. Alman misstates the definition of "motor carrier," claiming that the definition only requires that an entity operate a vehicle that has a GVWR of 10,001 pounds or greater. Not only does Ms. Altman's position misstate the definition of "motor vehicle" used in Title 40, Chapter 2, it also fails to interpret the statute strictly as required by law.

O.C.G.A. § 40-2-1(6)(b) defines "motor carrier" as "[a]ny entity defined by the commissioner [of revenue][1] or commissioner of public safety who operates or controls commercial motor vehicles as defined in 49 C.F.R. Section 390.5 or this chapter whether operated in interstate

[1] O.C.G.A. § 40-2-1(2) defines "commissioner" as "the state revenue commissioner."

or intrastate commerce, or both"[2] (emphasis added). One of the requirements under the definition is that the entity must fall within the scope of "motor carrier" as defined by the commissioner of revenue or commissioner of public safety. Ms. Altman has pointed to no source where either the Commissioner of Revenue or the Commissioner of Public Safety has defined a not for hire entity that operates a vehicle with a GVWR of 10,001 pounds or more as a "motor carrier."

The rules of the Georgia Department of Revenue define "motor carrier" as "an entity engaged in the transportation of goods or ten or more passengers for compensation wholly within the boundaries of this state." Rule 560-10-31-.01 (defining "motor carrier" as having the same meaning as provided in O.C.G.A. § 40-2-1(4), which defines a "for-hire intrastate motor carrier"). Arch is unaware of the Commissioner of Public Safety setting forth a different definition of "motor carrier."[3]

Thus, the definition of "motor carrier" for purposes of O.C.G.A. § 40-2-140 is a for-hire transporter of goods or passengers which "operates or controls commercial motor vehicles as defined in 49 C.F.R. Section 390.5" (in this case, a vehicle that's GVWR is 10,001 pounds or greater).

The foregoing interpretation is consistent with the interpretation of O.C.G.A. § 40-2-140, which strictly construes the statute as set forth by Arch in its Memorandum of Law in Support of Its Motion for Summary Judgment. In sum, the statute states that the registration and insurance requirements in O.C.G.A. § 40-2-140(d)(2) apply only to "for-hire motor carriers," so the direct

[2] Ms. Altman does not argue that VEO qualifies as a motor carrier pursuant to the definition provided in O.C.G.A. § 40-2-1(6)(a).

[3] The Rules of the Department of Safety state that "motor carrier" as used in its rules has the same definition as "motor carrier" in O.C.G.A. § 40-1-1. Ga. Comp. R. & Regs. R. 570-38-1.02. O.C.G.A. § 40-1-1(28.1), which defines "motor carrier" as having the same definition provided in O.C.G.A. § 40-2-1 and O.C.G.A. § 40-1-100, which defines "motor carrier" as "Every person owning, controlling, operating, or managing any motor vehicle…used in the business of transporting for hire persons, household goods, or property[]" (emphasis added). Thus, the Commissioner of Public Safety has adopted the definition of "motor carrier" set forth by the Commissioner of Revenue.

action authorization in O.C.G.A. § 40-2-140(d)(4), which is applicable to motor carriers "under this Code section," is intended to apply only to insurers of motor carriers that are subject to the insurance requirements for the protection of the public and required to register with the Department of Revenue, which, per the Department of Revenue, is limited to "for-hire motor carriers."

3. Only motor carriers for-hire are subject to a direct action under O.C.G.A. § 40-1-112.

O.C.G.A. § 40-1-100(12) plainly defines motor carrier as "[e]very person owning, controlling, operating, or managing any motor vehicle. . . .used in the business of transporting for hire persons, household goods, or property" (emphasis added). O.C.G.A. § 40-1-100(8) defines "for hire" as "an activity relating to a person engaged in the transportation of goods or passengers for compensation" (emphasis added).

Ms. Altman's argument that the definition of "motor carrier" in O.C.G.A. 40-1-100(12) excludes only certain non-profits is misplaced. First, her argument ignores that the statute specifically defines a "motor carrier" as one who transports property "for-hire," which is defined as "an activity relating to a person engaged in the transportation of goods or passengers for compensation" (emphasis added). Before one can look to the exceptions, the entity must be one that transports property in exchange for compensation. The issue is not that VEO is a non-profit. The issue is that it was not using the subject vehicle to transport property in exchange for compensation – it is not a common carrier, a contract carrier or a carrier for hire.

Second, Ms. Altman's argument misstates Arch's position. It does not contend that non-profit entities can never qualify as "motor carriers." Ms. Altman presupposes that non-profits do not use vehicles to transport goods or passengers in exchange for compensation which is flatly incorrect as they may be paid by others to transport goods or persons yet they simply would collect those revenues for providing transportation services as a non-profit organization. The exception for "[m]otor vehicles operated not for profit with a capacity of 15 persons" contemplates that such

vehicles can be operated in exchange for compensation to render transportation services. Operating a vehicle and providing transportation services in exchange for compensation and operating a vehicle providing transportation services "not for profit" are not one and the same. In this matter, VEO was not being paid to pick up or to transport property. Stated differently, VEO did not receive any consideration in exchange for its transportation of property.

4. As the authorizations for a direct action in O.C.G.A. §§ 40-1-120 and 40-2-140 apply only to motor carriers for-hire, Ms. Altman does not have standing to bring a direct action against Arch.

For the reasons explained above, O.C.G.A. § 40-2-140 authorizes direct actions only against insurers of "for-hire motor carriers." As for O.C.G.A. § 40-1-120, Ms. Altman correctly concedes that direct actions are authorized only against insurers of entities "owning, controlling, operating, or managing any motor vehicle…transporting for hire persons, household goods, or property[.]" O.C.G.A. § 40-1-100(12)(A). Thus, for Arch to be subject to a direct action under either statute, VEO must have, in this case, been operating the subject vehicle to transport for compensation persons or property.

As established by the Affidavit of Don Gibson, the use of the subject vehicle is limited to VEO's personal use to pick up donations and delivering donations of property. VEO receives no compensation in return for these transportation services. Moreover, it is not paid for donating property to veterans. It is indisputable that VEO was not using the subject vehicle to transport property for-hire. It is clearly not a contract or common carrier. Furthermore, Ms. Altman does not even allege in her Complaint that VEO operated the vehicle in exchange for compensation.

As VEO was not operating the subject vehicle to transport property or persons in exchange for compensation, Arch is not subject to a direct action under O.C.G.A. §§ 40-1-112 or 40-2-140.

B. Because Ms. Altman does not have standing to bring a direct action against Arch, her claims against Arch are subject to dismissal pursuant to O.C.G.A. 9-11-12(b)(6).

As explained above, in order for Ms. Altman to be able to assert a cognizable claim against Arch, VEO must have been operating a motor carrier for hire because Ms. Altman is not an insured under the Arch Policy. If VEO was not operating as a motor carrier for hire, Ms. Altman has no right to assert a direct action against Arch. If the Court finds that Ms. Altman lacks standing to assert a direct action against Arch and dismisses the action in response to its 12(b)(1) motion to dismiss, then Ms. Altman also fails to state a claim upon which relief can be granted and Arch is entitled to a dismissal under its 12(b)(6) motion.

C. Ms. Altman is not entitled to discovery before the dismissal of Arch.

Ms. Altman's argument that she is entitled to discovery misstates when a motion to dismiss is converted into a motion for summary judgment. A motion to dismiss is converted into a motion for summary judgment only when matters outside the pleadings are raised in support of a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6). Arch only relies on the Affidavit of Don Gibson in support of its motion to dismiss for lack of subject matter jurisdiction pursuant to O.C.G.A. § 9-11-12(b)(1).

Ms. Altman's argument is telling, as it is an admission that she cannot make a *prima facie* showing that she is authorized to bring a direct action against Arch under either O.C.G.A. §§ 40-1-120 or O.C.G.A. § 40-2-140. Ms. Altman has offered no evidence in support of her position or to rebut the sworn statements of Mr. Gibson, the Chief Financial Officer of VEO. It is evident that she wants to use the discovery process as an excuse to delve into the corporate and financial records of VEO.

Based on the foregoing and for the reasons stated in its Memorandum of Law in Support of Its Motion to Dismiss, Arch respectfully requests that the Court grant its Motion to Dismiss and dismiss the Complaint filed against Arch.

Respectfully submitted, this 9th day of July, 2021.

HALL BOOTH SMITH, P.C.

/s/ C. Michael Johnson
C. Michael Johnson, Georgia Bar No. 392550
mjohnson@hallboothsmith.com
Thomas K. Wingfield, Georgia Bar No. 770653
twingfield@hallboothsmith.com

Counsel for Defendant, Arch Insurance Company

191 Peachtree Street NE, Suite 2900
Atlanta, GA 30303-1775
Phone: (404) 954-5000
Fax: (404) 954-5020

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, filed electronically via CM/ECF a true copy of the within and foregoing **DEFENDANT ARCH INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** in the appropriate court of jurisdiction, with notice of same being electronically served by the Court, addressed to the following:

James E. Butler III, Esq.
Matthew R. Kahn, Esq.
BUTLER LAW FIRM
10 Lenox Pointe
Atlanta, GA 30324
jeb@butlerfirm.com
matt@butlerfirm.com

Counsel for Plaintiff, Erin Altman

Alphonsie Nelson, Esq.
C. Kimberly Liverpool-Settle, Esq.
QUINTAIRO, PRIETO, WOOD & BOYER, P.A.
365 Northridge Road, Suite 230
Atlanta, GA 30350
payton.bramlett@qpwblaw.com
kimberly.settle@qpwblaw.com

Counsel for Defendant, Veterans Empowerment Organization of Georgia, Inc. and Edward Davis

Savannah L. Bray, Esq.
WORSHAM, CORSI, DOBUR & BERSS
Post Office Box 674027
Marietta, GA 30006

GAEfile@progressive.com
sbray1@progressive.com

Counsel for Progressive Premier Insurance Company of IL

This 9th day of July, 2021.

HALL BOOTH SMITH, P.C.

/s/C. Michael Johnson
C. Michael Johnson
Georgia Bar No. 392550

Counsel for Defendant, Arch Insurance Company