IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TUDOR INSURANCE COMPANY, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:14-CV-2689-N
	§	
OCOTILLO REAL ESTATE INVESTMENTS I, LLC,	§	
	§	
Defendant.	§	

ORDER

This Order addresses Defendant Ocotillo Real Estate Investments I, LLC d/b/a Longhorn Self Storage's ("Ocotillo") motion to dismiss [Doc. 5]. The Court denies the motion and orders that this case be consolidated into civil action number 3:14-CV-3259-N.

I. THE INSURANCE DISPUTE

This is declaratory judgment action filed on July 28, 2014, in which Plaintiffs Tudor Insurance Company ("Tudor") and Lexington Insurance Company ("Lexington") (collectively, "Carriers") seek a declaration that they have no duty to provide coverage to Ocotillo for losses resulting from alleged hail damage to Ocotillo's property. In its motion to dismiss, Ocotillo argues that because it has filed a state court action (the "State Court Action") that will resolve all issue between the parties, the Court should abstain from considering this case.

Ocotillo filed the State Court Action on August 1, 2014. In the State Court Action, Ocotillo alleges claims against Carriers and additional defendants for violations of the Texas

Insurance Code, violations of the Texas Deceptive Trade Practices Act (the "DTPA"), breach of contract, and negligence. Carriers timely removed the State Court Action. That case is pending in this Court and is captioned civil action number 3:14-CV-3259, *Ocotillo Real Estate Investments I, LLC v. Lexington Insurance Company, et al.* On October 8, 2014, Ocotillo filed a motion to remand the removed State Court Action. By separate order of this date, the Court denied the motion to remand on the grounds that Ocotillo had improperly joined in-state defendants.

II. THE COURT DENIES THE MOTION TO DISMISS

A. Legal Standard

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), is " 'an enabling act, which confers discretion on the courts rather than an absolute right on a litigant.' " *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952)). A court must engage in a three-step inquiry when deciding whether to entertain or dismiss a declaratory judgment action. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). It must determine (1) whether a justiciable controversy exists, (2) whether it has authority to grant declaratory relief, and (3) whether, in its discretion, it should decide or dismiss the action. *Id.* Ocotillo does not appear to challenge the first two factors. Yet, for the sake of completeness, *see Am. Bankers Life Assurance Co. of Fl. v. Overton*, 128 F. App'x 399, 401 (5th Cir. 2005) (noting that a court is required to consider all three factors), the Court addresses each factor in turn.

B. A Justiciable Controversy Exists

The question of whether a declaratory judgment action is justiciable generally turns on whether an "actual controversy" exists. *Orix Credit Alliance* 212 F.3d at 895. "As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests.'" *Id.* at 896 (quoting *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986)) (alteration in original).

There can be little question that an actual controversy exists in this case. "The threat of litigation, if specific and concrete, can indeed establish a controversy upon which declaratory judgment can be based." *Orix Credit Alliance*, 212 F.3d at 897. According to Ocotillo, it "notified [Carriers] that it intended to a file a lawsuit against them" and "sent emails to counsel for [Carriers] asking if they were authorized to accept service for their clients." Def.'s Mot. Dismiss 16. Moreover, Ocotillo does not dispute the justiciability of this action. Accordingly, the Court concludes that a justiciable controversy exists.

C. The Court Has Authority to Grant Declaratory Relief

Under the Anti-Injunction Act, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "Under the second element of the *Orix Credit Alliance* test, a district court does not have authority to consider the merits of a declaratory judgment action when: (1) the declaratory defendant previously filed a cause of action in state court; (2) the

state case involved the same issues as those in the federal court; and (3) the district court is prohibited from enjoining the state proceedings under section 2283." *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 388 n.1 (5th Cir. 2003) (citing *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993)). Because the declaratory defendant, Ocotillo, filed its state court action *after* Carriers filed the declaratory judgment action, mandatory abstention is not required. *See, e.g.*, *Ford v. Monsour*, 2011 WL 4808173, at *3 (W.D. La. 2011). Moreover, neither party argues that the Court lacks authority to grant the declaratory relief requested, and the Court is not aware of any reason it might lack that authority. The Court therefore finds that it has authority to grant relief.

D. The Court Declines to Dismiss the Action

"It is now well-settled in the Fifth Circuit that a district court has discretion over whether to decide or dismiss a declaratory judgment action." *Travelers Ins.*, 996 F.2d at 778. In exercising this discretion, a court should consider several nonexhaustive factors (the "*Trejo* factors"):

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams, 343 F.3d at 388 (citing *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590–91 (5th Cir. 1994)). The Court concludes, after weighing all the *Trejo* factors, that dismissal is improper in this case.

First, there is no parallel state action currently pending. As previously discussed, Carriers removed the State Court Action, and the Court denied Ocotillo's motion to remand that case. That case is currently pending in this Court. As the Fifth Circuit has stated, "the lack of a pending parallel state proceeding . . . is a factor that weighs strongly against dismissal." *Sherwin Williams*, 343 F.3d at 394. However, because the Fifth Circuit does not adopt a *per se* rule that a Court must hear a declaratory judgment action in the absence of a parallel state action, *see id.*, the Court turns to the remaining *Trejo* factors.

Second, Ocotillo asserts that Carriers filed this action in anticipation of Ocotillo's State Court Action. Even if Carriers did so, a declaratory action is an appropriate and recognized method of resolving an insurance coverage dispute. *See, e.g.*, *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F. Supp. 2d 601, 630 (E.D. Tex. 2003) (listing declaratory action as among insurer's options under Texas law when faced with defending insured) (quoting *Farmers Tex. Cnty. Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 522 (Tex. Civ. App. – Austin 1980, writ ref'd n.r.e.)). Moreover, "[f]ederal declaratory judgment suits are routinely filed in anticipation of other litigation." *Sherwin-Williams*, 343 F.3d at 391. "Merely filing a declaratory judgment action in a federal court with jurisdiction to hear it, in anticipation of state court litigation, is not in itself improper anticipatory litigation or otherwise abusive 'forum shopping.'" *Id.* In fact, a "specific and concrete"

threat of litigation can in some cases make a declaratory action justiciable in the first place. *See Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). Carriers' filing of this suit, even if it anticipated a later filing by Ocotillo, is thus not improper or illegitimate. This factor, then, points toward retaining the action.

Third, there is no evidence that Carriers engaged in improper forum shopping. Ocotillo has not indicated why Carriers would have a strategic advantage in this action as opposed to another action. Moreover, this Court, like the state court, will apply Texas state law to this case. Because there is no evidence of forum shopping, the third factor suggests that the Court should not dismiss this case.

Fourth, there is no evidence of possible inequities in allowing Carriers to proceed in this forum. The fact that Carriers filed suit before Ocotillo did does not give them an unfair advantage. Ocotillo has identified no reason why proceeding here would somehow prejudice it. This factor favors retaining the case.

Fifth, this Court provides a convenient forum for the parties and witnesses. The dispute involves property located in Rowlett, Texas, which is part of the Dallas Division of the Northern District of Texas. This factor, then weighs in favor of Carriers. *See Admiral Ins. Co. v. Little Big Inch Pipeline Co.*, 496 F. Supp. 2d 787, 794 (W.D. Tex. 2007) ("[The fifth factor] does not ask whether the federal court is a *more* convenient forum than the state court, but only whether the federal court is convenient for all parties.").

Sixth, retaining this case would serve the purposes of judicial economy. The previous State Court Action was removed and is currently pending in this Court. As discussed below,

this Order consolidates the previous State Court Action and this action. Therefore, retaining the suit would not waste judicial resources as both cases will be litigated in the same forum before the same judge.

Seventh, the Court is not being called on to construe a state judicial decree involving the parties from a parallel action. This factor thus points toward not dismissing the lawsuit. *See Mid-Continent Cas. Co. v. Classic Star Grp., LP*, 2012 WL 4195262, at *5 (N.D. Tex. 2012) (concluding that fact that court is not construing state decree means seventh *Trejo* factor weighs in favor of hearing declaratory action); *Admiral Ins.*, 496 F. Supp. 2d at 793 (same). In conclusion, the *Trejo* factors weigh in favor of retaining the case.

E. Conclusion as to the Motion to Dismiss

The parties' conflict is justiciable, and the Court has authority to decide this case. Moreover, the *Trejo* factors weigh in favor of retaining this suit. The Court therefore declines to dismiss the suit.

III. THE COURT ORDERS THIS CASE BE CONSOLIDATED

Pursuant to Federal Rule of Civil Procedure 42(a), Civil Action No. 3:14-CV-2689-N, *Tudor Insurance Company, et al. v. Ocotillo Real Estate Investments I, LLC*, is consolidated into 3:14-CV-3259-N, *Ocotillo Real Estate Investments I, LLC v. Lexington Insurance Company, et al.* All future pleadings, motions, or other papers shall bear the caption for Case No. 3:14-CV-3259-N. The Clerk of the Court shall administratively close Civil Action No. 3:14-CV-2689-N for statistical purposes.

CONCLUSION

The Court denies Ocotillo's motion to dismiss and consolidates this action into Case No. 3:14-CV-3259-N.

Signed January 9, 2015.

David C. Godbey
United States District Judge