

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED OHIO INSURANCE CO.,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:15-cv-245-JDL
)	
JAN L. FISH,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON MOTION TO DISMISS AND FOR MORE DEFINITE
STATEMENT**

The defendant in this declaratory judgment action has moved to dismiss the complaint and, in the alternative, for a more definite statement. I recommend that the court deny the motions.

I. Applicable Legal Standards

A. The Motion to Dismiss

The motion to dismiss invokes Federal Rule of Civil Procedure 12(b)(6). Motion to Dismiss for Failure to State a Claim and Motion for a More Definite Statement (“Motion”) (ECF No. 7) at 1.

The Supreme Court has stated:

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. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and internal punctuation omitted). This standard requires the pleading of “only enough facts to state a claim to relief that

is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In ruling on a motion to dismiss under Rule 12(b)(6), a court assumes the truth of all of the well-pleaded facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Román-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 (1st Cir. 2011). Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted).

B. The Motion for a More Definite Statement

The defendant’s motion for a more definite statement is governed by Federal Rule of Civil Procedure 12(e).

A motion for more definite statement is granted only “[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” Fed. R. Civ. P. 12(e). Rule 12(e) motions are not favored “in light of the availability of pretrial discovery procedures.” *Cox v. Maine Mar. Acad.*, 122 F.R.D. 115, 116 (D. Me. 1988). The “Federal Rules employ the concept of notice pleading, and, for this reason, motions for a more definite statement are not favored.” *Delta Educ., Inc. v. Langlois*, 719 F. Supp. 42, 50 (D.N.H. 1989) (citation omitted). The “motion is granted sparingly since it is not to be used as a substitute for discovery in trial preparation . . . but is to be used only when a pleading is too general.” *Town of Hooksett Sch. Dist. v. W. R. Grace & Co.*, 617 F. Supp. 126, 135 (D.N.H. 1984). Rule 12(e) motions are designed to “strike at unintelligibility, rather than at lack of detail in the complaint.” *Cox*, 122 F.R.D. at 116. Accordingly, a Rule 12(e) motion properly is granted “only when a party is unable to determine the issues he must meet.” *Id.*

Haghkerdar v. Husson College, 226 F.R.D. 12, 13-14 (D. Me. 2005).

II. Factual Background

The complaint sets forth the following relevant factual allegations.¹ In November 2004, the defendant conveyed property to James Campbell and Anne Flagg Campbell in exchange for a mortgage. Declaratory Judgment Complaint (“Complaint”) (ECF No. 1) ¶¶ 3, 6. In May 2015, the Campbells filed a complaint against the defendant in Maine Superior Court alleging that they had suffered damages arising out of conduct of Fish relating to the mortgage. *Id.* ¶¶ 7-8.

The plaintiff issued a business owner’s policy of insurance to the defendant, Policy No. BP 0022202 00, effective from November 17, 2013, to November 17, 2014. *Id.* ¶ 9. The defendant tendered defense of the state lawsuit to the plaintiff, which is defending the defendant in that action under a reservation of rights. *Id.* ¶¶ 10-11. The plaintiff seeks a judgment declaring that it has no duty to defend or indemnify the defendant in the state lawsuit. *Id.* ¶ 12.

III. Discussion

A. The Motion to Dismiss

The defendant contends that the complaint only offers legal labels and conclusions, without stating why the plaintiff contends that it has no duty to defend. Motion at 5. She asserts that, in order to be legally sufficient, the complaint must state that the plaintiff has compared the complaint in the state lawsuit to the policy at issue and allege that no legal or factual basis could be developed at trial that would obligate it to pay under the policy. *Id.* However, the only authority it cites for

¹ The First Circuit has instructed that, in reviewing a complaint for sufficiency pursuant to Rule 12(b)(6), a court “should begin by identifying and disregarding statements in the complaint that merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action.” *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (citation and internal punctuation omitted). “Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.” *Id.* “If that factual content, so taken, allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility.” *Id.* (citation and internal quotation marks omitted).

this assertion, *Maine Mut. Fire Ins. Co. v. Gervais*, 1999 ME 134, ¶ 8, 745 A.2d 360, 362-63, supports neither posited “requirement.” The cited paragraph merely recites the well-known legal standard applicable to actions seeking court resolution of disputes over an insurer’s duty to defend its insured.

Contrary to the defendant’s unqualified assertion, the Maine Law Court has not “made clear [that] an insurer **must** make this very determination **before** it den[ies] an insured a duty to defend[.]” Motion at 5 (emphasis in original), and that the insurer must state in its complaint that it has made this determination, at least not in any decision cited by the defendant. Moreover, reciting in a complaint the completion by the plaintiff of this “determination” would be superfluous when the complaint asks the court to make that very—and binding—determination. The existence of the duty to defend is a question of law determined by a comparison of the underlying complaint and the language of the insurance policy at issue. *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 290 (1st Cir. 2005). The plaintiff makes its position on this question clear merely by filing the lawsuit, accompanying the complaint with a copy of the complaint in the underlying action and a copy of the policy at issue, and seeking that determination by a court. *See generally American Cas. Co. v. Krieger*, 181 F.3d 1113, 1120-21 (9th Cir. 1999) (allegations in complaint for declaratory judgment that defendant claimed that he was covered for incident by policy issued by plaintiff insurer and that insurer contended that it had no duty to defend under policy sufficient to put defendant on notice that coverage was in issue).

Given the fact that notice pleading is the standard in this and all federal courts, *Haghkerdar*, 226 F.R.D. at 14, the complaint in this action is sufficient to put the defendant on notice of the plaintiff’s claims. The motion to dismiss should be denied.

B. Motion for More Definite Statement

The defendant contends that she is entitled to a revised complaint that “allege[s] at least **one** particular basis on which the Complaint is premised[,]” Motion at 8 (emphasis in original), but the complaint already states such a basis: the plaintiff asserts that it has no duty to defend her in the underlying lawsuit. Complaint ¶ 12. Nothing more is required to initiate a declaratory judgment action where the only issue is the insurer’s duty to defend its insured in a particular lawsuit, particularly where, as here, the policy itself and the complaint in the underlying action, which are to be compared in order to resolve the single issue, are attached to the complaint. *See, e.g., Krieger*, 181 F.3d at 1120-21. To require an insurer to include in its complaint a preview of its motion for summary judgment or for judgment on the pleadings would be essentially an empty exercise.

C. Fed. R. Civ. P. 1

The defendant argues briefly that, because of the alleged failures of the complaint already discussed, the complaint also violates Federal Rule of Civil Procedure 1, which directs the manner in which all of the civil rules should be construed. This is a cumulative argument, which does not stand independently when, as here, the two arguments upon which it is based must be rejected.

IV. Conclusion

For the foregoing reasons, I recommend that the court **DENY** the motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within fourteen (14)

days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of December, 2015.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge