

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Court Address: 1437 Bannock St., Denver, CO 80202</p> <hr/> <p>Plaintiff(s): PAPA GROUP RETAIL, INC., a State corporation</p> <p>v.</p> <p>Defendant(s): ALPHA INDEMNITY, as successor to INSURANCE COMPANY OF BETA, CHARLIE CASUALTY COMPANY, DELTA INSURANCE COMPANY, as successor to ECHO INSURANCE COMPANY, FOXTROT INSURANCE COMPANY, as successor to GOLF INSURANCE COMPANY, THE HOTEL INDEMNITY COMPANY, and INDIANSURANCE COMPANY, Individually</p>	
<p>Plaintiff(s): CHARLIE CASUALTY COMPANY</p> <p>v.</p> <p>Defendant(s): JULIET INSURANCE COMPANY and KILO INSURANCE COMPANY OF AMERICA</p>	
ORDER RE: DEFENDANT’S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT FILED ON MONTH 00, 2007	

THIS MATTER is before me on Defendant, FOX Insurance Company’s, as successor by merger to Golf Insurance Company [“FOX”] *motion to dismiss for failure to state a claim, or in the alternative, for summary judgment filed on Month 00, 2007*. I have reviewed the motion, response, reply and court file, as well as applicable case and statute law. I make the following findings and conclusions and enter the following ORDERS:

Motions to dismiss a complaint under C.R.C.P. 12(b)(5) are viewed with disfavor, and should not be granted unless it appears beyond a doubt that the plaintiff cannot prove facts in support that would entitle him to relief. *Sweeny v. UA Theater Circuit*, 119 P.3d 358 (Colo. Ct. App. 2005) In determining whether a complaint should be dismissed the court must consider only the matters stated within complaint. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). Since the motion, response, and reply in this case have alleged facts outside those stated within the complaint, the motion to dismiss will be treated as a motion for summary judgment under C.R.C.P. 56.

A motion for summary judgment is proper where the pleadings, the affidavits, and the depositions filed in a matter show that no genuine issue of material fact remains. *Morlan v. Durland Trust Co.*, 127 Colo. 5 (Colo. 1952). This case involves five claims for relief against the Defendant FOX: (1) declaratory Relief regarding duty to indemnify; (2) breach of contract regarding duty to defend, (3) specific performance regarding duty to defend; (4) declaratory relief regarding duty to indemnify; (5) breach of contract regarding duty to indemnify. Each claim involves some material disputed facts including, but not necessarily limited to, the following: 1) when the contamination from the Lima site first occurred; 2) how long the contamination lasted; 3) whether the Juliet Policy is limit is exhausted.

Defendant's Motion to Dismiss for Failure to State a Claim under C.R.C.P. Rule 12(b)(5) is **DENIED**. Defendant's Motion for Summary Judgment under C.R.C.P. Rule 56 is **DENIED**.

Dated this ____ day of September, 2007.

Judge
District Court Judge, Courtroom 0