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United States District Court,
W.D. Oklahoma.

Charles BURTON and Barbara Burton, Plaintiffs,
v.
PROGRESSIVE NORTHERN INSURANCE COMPANY et al., Defendants.

No. CIV–10–921–W. | Oct. 21, 2010.

Attorneys and Law Firms

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Opinion

ORDER

LEE R. WEST, District Judge.

***1** Plaintiffs Charles Burton and Barbara Burton commenced this action on April 21, 2010, inthe District Court for Oklahoma County, Oklahoma, against defendant Progressive Casualty Insurance Company ("PCIC") and alleged in their state court petition

(1) that on January 4, 2007, a fire occurred at a dwelling they owned;

(2) that the fire was directly caused by a defect in a 2005 Ford E–150 van that was manufactured by Ford Motor Company ("Ford Motor");

(3) that the van was unreasonably dangerous and defective at the time it was manufactured;

(4) that the fire caused extensive damage to the vehicle, the dwelling and their personal property;

(5) that at the time of the fire, the van was covered by a policy of insurance issued by PCIC, and that after the fire, PCIC took possession of the van;

(6) that PCIC paid a portion of the losses caused by the fire;

(7) that PCIC knew that the Burtons "intended to seek recovery from ... Ford Motor ... for uninsured losses caused by the defective ... van and the resulting fire," Petition at 2, ¶ 11, and that it also knew that the Burtons "would need the van in order to pursue their claims for uninsured losses against ... Ford Motor ...," *id.;*

(8) that the van was to be inspected on April 22, 2008, but at the time the inspection was to occur, the van was not at the designated location; and

(9) that PCIC "[e]ventually ... acknowledged it had lost, destroyed or otherwise disposed of the van." *Id.* at 3, ¶ 13.

The Burtons asserted a claim for negligence in their state court petition and contended that PCIC owed them "a duty ... to preserve, protect and use ordinary care to prevent the loss and/or destruction of the ... van." *Id.* ¶ 14.

On July 19, 2010, the Burtons filed an Application for Leave to File Amended Petition, wherein they requested permission to name as a "proposed [c]o-defendant," Progressive Northern Insurance Company ("PNIC"). Their application was granted on August 11, 2010, and filed in the state court on August 12, 2010. On that same day, August 12, 2010, the Burtons filed their amended petition (hereafter "amended complaint"), and named as the sole defendant, PNIC.

The Burtons alleged in the amended complaint that they sought damages for PNIC's alleged "negligence, ... breach of contract and breach of its duty to treat them fairly and in good faith." Amended Complaint at 1, ¶ 1. The Burtons repeated in that pleading their allegations about the fire, the defective nature of the van, the insurance coverage, and the loss or destruction of the van.

The Burtons then set forth three causes of action. They first contended that PNIC "knew ... [they], as well as other interested parties, were seeking recovery for damages from Ford [Motor] for the defective van," *id.* at 3, ¶ 15, and that "[a]s a result, ... [PNIC] owed a duty to ... [them] to preserve, protect and use ordinary care to prevent the loss and/or destruction of the ... van." *Id.; e.g., id.* ¶ 17 (PNIC "failed to use ordinary care in the safe keeping of the ... van, which it knew or should have known, was vital to the Plaintiffs' claim against Ford [Motor] and/or was the subject of eventual litigation").

***2** In their second claim for relief, the Burtons alleged that PNIC, as their insurer, owed them a duty to deal fairly and to act in good faith, and that PNIC had breached its duty

(1) by "failing and refusing to prevent the loss and/or destruction of the ... van, when it knew the van was vital to its insured[s'] claim for uninsured losses and/or was the subject of eventual litigation," *id.* 4, ¶ 20(a);

(2) by "failing to properly investigate [the] ... claims surrounding [their] ... uninsured loss," *id.* ¶ 20(b);

(3) by "failing to adopt and implement reasonable standards for the prompt investigation and reasonable handling of claims arising under the policy," *id.* ¶ 20(c); and

(4) by "not attempting in good faith to prevent the loss and/or destruction of the van, when ... [PNIC] knew that [the] van was vital to its insured[s'] claim for uninsured losses and/or was the subject of eventual litigation." *Id.* ¶ 20(d).

In the third claim for relief set forth in the amended complaint, the Burtons alleged that PNIC, "[s]ubject to certain express limitations, ... owe[d] [them] ... a contractual obligation under the policy of insurance covering the ... van at the time of the ... fire," Amended Complaint at 5, ¶ 23, and that PNIC had breached its contractual obligations "by failing to protect [their] ... rights under the contract and preventing [their] ... ability to pursue uninsured damages." *Id.* ¶ 25.

On August 24, 2010, both PNIC and PCIC [1] removed the matter. See Doc. 1. They stated in the Notice of Removal that this Court has jurisdiction over the subject matter under title 28, section 1332 of the United States Code because the parties are of diverse citizenship and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

The matter now comes before the Court on PNIC's Motion to Dismiss. The Burtons have responded in opposition, and PNIC has filed a reply, as amended. Based upon the record, the Court makes its determination.

PNIC has sought dismissal of the Burtons' amended complaint for failure to state a claim for relief under Rule 12(b)(6), F.R.Civ.P. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court set forth the standards that this Court must use in determining whether dismissal, as PNIC has requested, is warranted under Rule 12(b)(6). [2] The Supreme Court held in accordance with Rule 8, F.R.Civ.P., that to withstand a motion to dismiss, a complaint need not contain "heightened fact pleading of specifics," 550 U.S. at 570, or "detailed factual allegations," *id.* at 555 (citations omitted), but it must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

The United States Court of Appeals for the Tenth Circuit has stated that *Twombly* imposes a "burden ... on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that ... [it] is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir.2008)(quoting 550 U.S. at 556). Thus, "[t]he allegations [in the Burtons' amended complaint] must be enough that, if assumed to be true, ... [the Burtons] plausibly (not just speculatively) ha[ve] a claim for relief [against PNIC]." *Id.* (footnote omitted). The Court's task therefore at this stage is to determine whether "there are well-pleaded factual allegations," *Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009), in the Burtons' amended complaint, and if so, the "[C]ourt should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

> ***3** A claim has facial plausibility when the plaintiff pleads *factual content* that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Id. at 1949 (citations omitted)(emphasis added).

PNIC has first challenged the Burtons' negligence claim and has asserted two grounds which it has contended entitles it to dismissal of this claim. PNIC has first argued that the Burtons cannot pursue a negligence claim against it because their relationship arises out of, and is grounded on, the motor vehicle policy issued by PNIC. Under the circumstances of this case, the Court agrees.

In *Lewis v. Farmers Insurance Co.*, 681 P.2d 67 (Okla.1983), the Oklahoma Supreme Court reaffirmed that there are

> *two* causes of action which may be asserted premised on the existence of an insurance contract: an action based on the contract; and an action for breach of the implied duty to deal fairly and in good faith.

Id. at 69 (citing *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla.1978))(emphasis added). The state court further noted that "[t]ort liability may be imposed only if there is a clear showing that the insurer, in bad faith ... [acts] unreasonably." *Id.* at 70. Mere negligence does not give rise to a claim by an insured against its insurer. *E.g.*, *Badillo v. Mid Century Insurance Co.*, 121 P.3d 1080, 1094 (Okla.2005); *see, e.g .*, *Murchison v. Progressive Northern Insurance Co.*, 572 F.Supp.2d 1281, 1284 (E.D.Okla.2008)(based on *Lewis*, it does not appear that separate tort action for negligence exists).

PNIC has also contended that the Burtons' negligence claim fails under the circumstances of this case because PNIC owed no duty of care "to preserve, protect and use ordinary care to prevent the loss and/or destruction of the ... van," Amended Complaint at 3, ¶ 15, "which it knew or should have known, was vital to the ... [Burtons'] claim against Ford [Motor] and/or was the subject of eventual litigation." *Id.* ¶ 17.

"The threshold question [of law] in any negligence action is whether the defendant owed a duty of care to the plaintiff," *Morales v. City of Oklahoma City*, 230 P.3d 869, 878 (Okla.2010); *e.g.*, *Delbrel v. Doenges Brothers Ford, Inc.*, 913 P.2d 1318, 1320 (Okla.1996)(duty of case is question of law), and the parties have agreed that the Court must look to Oklahoma law to answer this question.

In *Patel v. OMH Medical Center, Inc.*, 987 P.2d 1185 (Okla.1999), the Oklahoma Supreme Court defined spoliation as '[t]he destruction of evidence,' " *id.* (footnote omitted), and it held that spoliation

> ***4** occur[red] when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove ... [its] claim.

Id. The state court further stated that the tort of spoliation of evidence has never been recognized as a viable cause of action in this state. *E.g., id.* at 1202.

The Burtons have contended that they are not pursuing a cause of action for spoliation of evidence, but rather are seeking damages for PNIC's "misconduct connected to ... [its] investigation and safe-keeping of [the van] ...," Doc. 10, at 5–6, and that PNIC had a

> duty arising from the relationship of the parties and the understanding and assurances between said parties that [PNIC].. would maintain and keep safe the automobile in question....

Id. [3]

The Court finds that the Burtons' attempts to distinguish *Patel* and their efforts to recast this cause of action as one based upon a duty to "maintain and keep safe" fail. Subsequent to its decision in *Patel*, the Oklahoma Supreme Court further defined the term "spoliation," and included in its definition, not only "the destruction or material alteration of evidence," *Barnett v. Simmons*, 197 P.3d 12, 20 (Okla.2008) (citation omitted), but also

> the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

Id. The state court further stated that spoliation

> includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim.

Id. (citing *Koch v. Koch Industries, Inc.*, 197 F.R.D. 488, 490 (N.D.Okla.1999)).

It is clear that the Burtons are seeking to recover damages based upon PNIC's alleged

> fai[ure] to use ordinary care in the safe keeping of the ... van, which ... [PNIC] knew or should have known was vital to ... [the Burtons'] claim against Ford [Motor, the manufacturer of the van,] and/or was the subject of eventual litigation,

Amended Complaint at 4, ¶ 17, and further, that such damages

> includ[e] but [are] not limited to the [Burtons'] inability to pursue a claim for uninsured losses against ... [Ford Motor].

Id. ¶ 16.

The Burtons have failed to cite any authority which not only imposes a duty upon PNIC, but also recognizes a viable cause of action in tort for a breach of that duty under the same or similar circumstances. *E.g.*, 987 P.2d at 1202. [4]

Accordingly, upon viewing the allegations in the amended complaint and drawing all reasonable inferences therefrom in a light most favorable to the Burtons to determine whether, under *Twombly* and *Iqbal* and relevant Oklahoma law, they have sufficiently alleged a negligence claim, the Court finds that the Burtons' allegations do not "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S.Ct. at 1950. Accordingly, PNIC is entitled to dismissal of the Burtons' first claim for relief.

***5** PNIC has also challenged the Burton's claim for breach of contract, which is grounded on their contention that PNIC "fail[ed] to protect ... [their] rights under the contract [by failing to preserve the van and ... prevent its loss and/or destruction]." Amended Complaint at 6, ¶ 24. PNIC has contended that the terms of the motor vehicle insurance policy [5] do not require PNIC to preserve or otherwise retain the van, and that the policy explicitly states that no such duty is owed to the Burtons.

The motor vehicle policy at issue in this case reads:

> If ... [PNIC] retain[s] salvage, [PNIC has] ... no duty to preserve or otherwise retain the salvage for any purpose, including evidence for any civil or criminal proceeding.

Defense Exhibit 1, at p. 41.

The Burtons have responded "that they cannot dispute the [foregoing] language of the contract." Doc. 10 at 7. They have argued however that "the language of the contract is not controlling over representations made by ... [PNIC]," Doc. 10, and that "[i]f [PNIC] entered into an oral contract to safely maintain the vehicle in question, this would supercede the contract provision referred to by ... [PNIC]." *Id.* (emphasis added).

The Burtons, however, did not assert a cause of action based upon any misrepresentation or for breach of any supposed oral contract in their amended complaint. Rather, they alleged that PNIC

> owe[d] [them] a contractual obligation under the policy of insurance covering the ... van at the time of the ... fire.

Amended Complaint at 6, ¶ 23.

Because the Burtons' "allegations of breach of contract are directly and dispositively contradicted by the terms of the [parties' insurance policy] ...," *Elliot Plaza Pharmacy. LLC v. Aetna U.S. Healthcare, Inc.*, 2009 WL 702837 * 3 (N.D.Okla.2009), the Court finds these allegations do not "plausibly give rise to an entitlement to relief," Iqbal, 129 S.Ct. at 1950, and that PNIC is entitled to dismissal of the Burtons' breach of contract claim. [6]

Finally, PNIC has challenged the Burtons' claim for breach of the implied duty to deal fairly and in good faith. In Oklahoma, "an insurer has an implied duty to deal fairly and act in good faith with its insured and ... the violation of this duty gives rise to an action in tort...." *Christian*, 577 P.2d at 904. An " 'insurer does not breach th[is] duty ... by refusing to pay a claim or by litigating a dispute with its insured if there is a "legitimate dispute" as to coverage or amount of the claim, and the insurer's position is "reasonable and legitimate.' " " *Oulds v. Principal Mutual Life Insurance Co.*, 6 F.3d 1431, 1436 (10th Cir.1993)(quoting *Thompson v. Shelter Mutual Insurance*, 875 F.2d 1460, 1462 (10th Cir.1989) (quoting *Manis v. Hartford Fire Insurance Co.*, 681 P.2d 760, 762 (Okla.1984))).

PNIC has contended that it cannot be held liable for the tort of bad faith because the Burtons cannot show that it withheld any payment of benefits on their claim. *E.g.*, *McCoy v. Oklahoma Farm Bureau Mutual Insurance Co., 841 P.2d 568, 572 (Okla.1992) (insurer liable unless it had justifiable reason for withholding payment under the policy).*

***6** The Court disagrees to the extent that PNIC has contended that the denial of, or a delay in, payment is the only circumstance that may ever give rise to liability. *E.g.*, *Buzzard v. Farmers Insurance Co.*, 824 P.2d 1105, 1109 (Okla.1991)(insurer has duty to conduct reasonably appropriate investigation). *See, e.g.*, *Brown v. Patel*, 157P.3d 117, 122 (Okla.2007)(recognizing that bad-faith actions have been based on insurer's failure to follow judicial construction of insurance contracts or available applicable law); *Newport v. USAA*, 11 P.3d 190, 195 (Okla.2000)(insurer's decision based on less than thorough investigation of underlying circumstances of claim may give rise to reasonable inference of bad faith); *id.* at 197 (duty of good faith and fair dealing prevents insurer from offering less than what its own investigation reveals to be claim's value). Notwithstanding its disagreement with PNIC on this issue, the Court finds that the instant tort claim should be dismissed.

Ordinarily in Oklahoma, as the United States Court of Appeals for the Tenth Circuit recognized in *Oldenkamp v. United American Insurance Co.*, 619 F.3d 1243, 2010 WL

3758715 (10th Cir.2010), a *Christian* claim cannot proceed if the underlying coverage claim fails.[7] Because PNIC is entitled to dismissal of the Burtons' breach of contract claim, it is likewise entitled to dismissal of their tort claim for breach of the implied duty to deal fairly and to act in good faith.

To circumvent this finding, the Burtons have argued that

> while ... [PNIC] might have paid the claim, the investigation was ongoing and during this investigation period, ... [PNIC] failed to maintain the car, the central piece of evidence to the investigation. There was more to this investigation than simply the value of the automobile.... There was a mutual understanding amongst the multiple insurance companies involved, including ... [PNIC], and the ... [Burtons] that the car would be kept safe.

Doc. 10, at 8.

Even assuming the existence of "a mutual understanding", the Oklahoma Supreme Court has held that "the actions of an insurer after payment is made cannot be the basis of [a] ... bad faith claim." *Skinner v. John Deere Insurance Co.*, 998 P.2d 1219, 1223 (Okla.2000); *e.g.*, *Hale v. A.G. Insurance Co.*, 138 P.3d 567, 571 (Okla.App.2006)(in bad faith cases, cutoff for relevant evidence is date of payment or denial of claim; duty of good faith and fair dealing exists during time claim is being reviewed). Thus, even construing the allegations in the Burtons' amended complaint and all reasonable inferences drawn therefrom in the light most favorable to the Burtons, the Court finds that the Burtons' *Christian* claim does not "plausibly give rise to an entitlement to relief." *Iqbal*, 29 S.Ct. 1950.

Accordingly, the Court

(1) GRANTS the Motion to Dismiss [Doc. 6] filed by PNIC on August 27, 2010;

(2) DISMISSES this matter as to PNIC;

***7** (3) but FINDS that the Court's dismissal of the Burtons' claims against PNIC is without prejudice and that the Burtons should be granted the opportunity to amend their amended complaint in accordance with *Twombly*, *Iqbal*, extant Oklahoma law and Rule 11, F.R.Civ.P., "to frame a 'complaint with enough factual matter (taken as true) to suggest' that ... [they are] entitled to relief," *Robbins*, 519 F.3d at 1247 (quoting 550 U.S. at 556), against PNIC; and

(3) DIRECTS the Burtons, should they intend to pursue this lawsuit against PNIC, to file a second amended complaint within seven (7) days of this date.

Footnotes

1 The Burtons have now dismissed PCIC from this lawsuit with prejudice. See Doc. 12.

2 In their response, the Burtons have relied upon the standard articulated by the United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "The Supreme Court recently retired 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir.2009)(quoting *Conley*, 355 U.S. at 45–46, *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *e.g.*, *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir.2008)(Supreme Court has rejected "no set of facts" language of *Conley*).

3 In their response, the Burtons have stated: "[They] relied upon ... [PNIC's] assertions and indications to ... [them] that ... [it] would keep the vehicle safe," Doc. at 10, at 6, and that their claim that PNIC "negligently disposed of or failed to maintain property," *id.* at 5, rests upon "understandings and assurances between the two parties." *Id.* Such allegations have not however been asserted in the Burtons' amended complaint.

4 To prevail on a claim of negligence in Oklahoma, a plaintiff must prove by the greater weight of the evidence the following essential elements;

> (1) a duty to the plaintiff, (2) a violation of that duty, and (3) injury resulting from that violation.

Teeter v. City of Edmond, 85 P.3d 817, 823 (Okla.2004) (citation omitted).

5 In reviewing a motion filed under Rule 12(b)(6), F.R.Civ.P., the Court must consider only the factual allegations asserted in the challenged pleading. "If ... matters outside the pleadings are presented to and not excluded by the [C]ourt, the motion must be treated as one for summary judgment under Rule 56[, F.R.Civ.P.]" Rule 12(b)(6), *supra.*

Thus, if the Court considers a document, such as the motor vehicle policy issued to the Burtons by PNIC, the Court must convert PNIC's Motion to Dismiss to a summary judgment motion unless the document relied upon by the Court is referred to in the

Burtons' amended complaint, is central to their claim, and is not disputed as to its authenticity. *E.g.*, *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir.2007); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir.2002).

The motor vehicle policy is referred to by the Burtons in their amended complaint, *e.g.*, Amended Complaint at 3, ¶ 10; moreover, its existence and terms are central to their claim for breach of contract. *E.g.*, *id.* ¶¶ 23–24. And because there has been no challenge to the authenticity of the copy of the motor vehicle policy submitted by PNIC, the Court has considered the policy's terms in resolving the issues raised by PNIC.

6 Having so determined, the Court has not addressed PNIC's second challenge to the Burtons' breach of contract claim. *See* Doc. 7, Proposition ll(B).

7 The circuit court has noted however that under certain narrow circumstances, "a bad faith claim could be successfully brought by an insured whose primary breach of contract claim had failed." *Oldenkamp v. United American Insurance Co.*, 619 F.3d 1243, 2010 WL 3758715 (10th Cir.2010)(citing *Brown v. Patel*, 157 P.3d 117 (Okla.2007)). Such circumstances are not before the Court.

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