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United States District Court,
W.D. Oklahoma.

STATE FARM FIRE AND
CASUALTY COMPANY, Plaintiff,
v.
PROGRESSIVE NORTHERN INSURANCE
COMPANY et al., Defendants.

No. CIV–10–917–W. | Oct. 19, 2010.

Attorneys and Law Firms

Matthew C. Frisby, Goolsby Olson & Proctor, Oklahoma City, OK, for Plaintiff.

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Opinion

ORDER

LEE R. WEST, District Judge.

***1** This matter comes before the Court on the Motion to Dismiss filed by defendant Progressive Northern Insurance Company ("PNIC"), Plaintiff State Farm Fire and Casualty Company ("State Farm") has responded in opposition, and PNIC has filed a reply. Based upon the allegations in State Farm's amended pleading, the Court makes its determination.

State Farm commenced this action on April 21, 2010, in the District Court for Oklahoma County, Oklahoma, against Progressive Casualty Insurance Company ("PCIC"). On August 12, 2010, State Farm filed an amended petition (hereafter "amended complaint") and named PNIC as defendant.

State Farm alleged in that amended pleading that

(1) on January 4, 2007, a fire occurred at a dwelling insured by State Farm;

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

(3) that at the time of the fire, the vehicle was insured by a policy issued by PNIC;

(4) that "[u]nder this policy ... [PNIC] paid a portion of the losses associated with the Ford van and took possession of the Ford van for safe keeping," Amended Complaint at 3, ¶ 10;

(5) that PNIC knew that State Farm was seeking recovery from Ford Motor Company ("Ford Motor"), the manufacturer of the van for losses caused by the fire, namely, that amount of money paid by State Farm as a result of the fire;

(6) that PNIC knew that the van was to be inspected on April 22, 2008, but at the time the inspection was to occur, "the vehicle was not at ... [PNIC's] location," *id.* at 4, ¶ 14; and

(7) that PNIC "acknowledged it had lost, destroyed or otherwise disposed of the vehicle." *id.*

State Farm further contended

(1) that PNIC "knew [State Farm] ..., as well as other interested parties, were seeking recovery for damages from ... [the manufacturer of] the defective van," *id.* ¶ 15;

(2) that PNIC therefore "owed a duty to ... [State Farm] to preserve, protect and use ordinary care to prevent the loss and/or destruction of the ... vehicle," *Id.;*

(3) that as a result of PNIC's negligent failure "to preserve, protect and use ordinary care," *id.*, State Farm "suffered damages, including but not limited to the inability to pursue a claim for subrogation against the manufacturer of the defective van," *id.* ¶ 16; and

(4) that PNIC "knew or should have known [that the van] was vital to ... [State Farm's] claim against Ford [Motor] and/or was the subject of eventual litigation." *Id.* ¶ 17.

PNIC as well as PCIC [1] removed the action on August 23, 2010, *see* Doc. 1, and asserted that this Court has jurisdiction over the subject matter of this action under title 28, section 1332 of the United States Code because the citizenship of the parties is diverse and the amount in controversy exceeds $75,000.00, exclusive of interest and costs.

PNIC has sought dismissal of State Farm's 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.

***2** 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 State Farm's amended complaint] must be enough that, if assumed to be true, ... [State Farm] plausibly (not just speculatively) has 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 State Farm's 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.*

> 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).

"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 it spoliation

> 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 by as a viable cause of action in this state. *E.g.*, *id.* at 1202.

State Farm has contended that it is not pursuing a cause of action for spoliation of evidence, but rather is seeking damages for PNIC's "misconduct connected to ... [its] investigation and safe-keeping of [the van] ..." Doc. 9, at 5, 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 State Farm's attempts to distinguish *Patel* and its efforts to recast its 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

> ***3** the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

Id. It 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 State Farm is seeking to recover damages based upon PNIC's alleged

> negligen[ce] for failing to use ordinary care in the safe keeping of the ... van, which ... [PNIC] knew or should have known was vital to ... [State Farm's] claim against Ford [Motor, the manufacturer of the van,] and/or was the subject of eventual litigation.

Amended Complaint at 4, ¶ 17.

State Farm has however failed to cite any authority which not only imposes a duty upon PNIC, but also which 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 State Farm to determine whether, under *Twombly* and *Iqbal* and relevant Oklahoma law, State Farm has sufficiently alleged a claim, the Court finds that State Farm's allegations do not "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S.Ct. at 1950.

The Court therefore

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

(2) DISMISSES this matter as to PNIC; and

(3) DIRECTS State Farm to advise this Court in writing within seven (7) days of the status of this matter as to PCIC. [5]

Footnotes

1 PNIC stated in its Notice of Removal that State Farm "named the wrong insurance company," Doc. 1, at 1, ¶ 2, in its state court petition but "[s]o far ... ha[s] not dismissed [PCIC] ... from the present action. [PNIC] ... anticipate[s] ... [PCIC] will be dismissed soon after this case is removed." *Id.* at 3, ¶ 6.

2 In its response, State Farm has 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 its response, State Farm has stated: "State Farm has made a negligence claim in this action," Doc. 9, at 4, and that its claim rests upon "understandings and assurances between the two parties," *id.*, that PNIC "would maintain and keep safe the automobile in question." *Id.* at 5. Such allegations have not however been asserted in State Farm's amended complaint, and in any event, State Farm has cited no authority that would support the proposition that such allegations would give rise to a viable claim under the instant circumstances.

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 its Application for Leave to File Amended Petition filed in the state district court on July 19, 2010, State Farm stated that "[t]his is an action seeking recovery of damages for negligence ... by current [d]efendant, [PCIC] ... and/or proposed *[c]o-[d]efendant*, [PNIC] ..., Application for Leave to File Amended Petition at 1, ¶ 1 (emphasis added), and State Farm sought permission in that paper "to add [PNIC] ... as [a] party [d]efendant[ ]." *Id.* ¶ 3. It attached to its application, a proposed amended petition that named both PCIC and PNIC as party defendants. However, in its amended petition filed on August 12, 2010, State Farm named only PNIC as the defendant.

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