

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ESSEX MARINA CITY CLUB, L.P.,)	Case No. 11-408 SC
)	
Plaintiff,)	ORDER DENYING CONTINENTAL'S
)	<u>SECOND MOTION TO DISMISS</u>
v.)	
)	
CONTINENTAL CASUALTY COMPANY,)	
)	
Defendant.)	
)	
)	

I. INTRODUCTION

Before the Court is a fully briefed motion by Defendant Continental Casualty Company ("Continental") to dismiss the First Amended Complaint filed by Plaintiff Essex Marina City Club, L.P. ("Essex"). ECF Nos. 33 ("Mot."), 46 ("Opp'n"), 47 ("Reply"). For the following reasons, the Court DENIES Continental's Motion.

II. BACKGROUND

As it must on a Rule 12(b)(6) motion, the Court assumes the truth of the following well-pleaded facts taken from Essex's First Amended Complaint. ECF No. 26 ("FAC"). Essex, a California-based limited partnership, leased real property located in Marina Del Rey, California under a long-term master lease between Essex's predecessor-in-interest and the County of Los Angeles. Id. ¶¶ 1, 6. Essex's lease was subject to a sublease between its

1 predecessor-in-interest and Marina City Condominiums ("MCC"). Id.
2 ¶ 6. Under this sublease, MCC had the right to assign its
3 subleasehold interest, on a condominium-by-condominium basis, to
4 individual condominium owners. Id. ¶ 7. Under a subleasehold deed
5 of trust held by Essex, each condominium owner was required to pay
6 Essex a monthly maintenance fee for common-area operating expenses,
7 supplemental maintenance fees, a separate "ground rent," and other
8 fees and expenses. Id. ¶ 8.

9 The Marina City Club Condominium Owners Association
10 ("Association") is apparently an association of individual
11 condominium owners.¹ In 1994, Essex's predecessor-in-interest and
12 the Association entered into an agreement ("the 1994 Agreement") to
13 establish a "Management Council" to collect maintenance fees and
14 manage any common areas covered by the monthly maintenance fees.
15 Id. ¶ 9. Under this Agreement, the Management Council would
16 consist of two members appointed by Essex's predecessor-in-interest
17 (and, subsequently, Essex) and two members of the Board of
18 Directors of the Association. Id. ¶ 10. The Management Council
19 was responsible for oversight and maintenance of the property,
20 processing of evictions, management of the operating budget, and
21 collection and enforcement of monthly maintenance fees and ground
22 rents. Id. ¶ 11.

23 Continental, an insurance company, issued a professional
24 liability policy to the Association for the period from November,
25 16, 2007 to November 16, 2008. Id. ¶ 18; Brisbin Decl. Ex. 1
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28 ¹ Neither the Complaint nor the papers filed by the parties clearly
identify or describe the Association.

1 ("Policy").² The sole named insured identified in the Policy is
2 the Association. Id. An Endorsement to the Policy ("the
3 Endorsement") extended the definition of "insured" to include "any
4 Property Manager," as defined in the Endorsement. Id. ¶ 19. The
5 Policy is a "claims-made" policy that affords coverage for all
6 claims first made against any insured during the policy period.
7 Id. ¶ 20.

8 In its capacity as a member of the Management Council, Essex
9 initiated foreclosure proceedings against a condominium owner who
10 allegedly failed to pay the required monthly fees and rent; the
11 condominium was sold at a foreclosure sale. Id. ¶¶ 12-13. In
12 February 2008, IndyMac Bank, F.S.B. ("IndyMac") filed a lawsuit
13 against Essex and others to set aside the foreclosure sale and
14 quiet title to the condominium ("the IndyMac proceedings"). Id. ¶
15 14. Around July 2008, Essex submitted a claim under the Policy to
16 Continental for indemnity and defense of the IndyMac proceedings.
17 Id. ¶ 21. With its claim, Essex sent Continental copies of the
18 lease and sublease, the Agreement, and "additional documents
19 establishing the potential for coverage under the Policy and
20 therefore Continental's immediate duty to defend Essex in the
21 IndyMac Litigation." Id. ¶ 23.

22 Essex alleges that Continental failed to make a timely
23 coverage decision on Essex's claim. Id. ¶ 24. It alleges that
24 Continental played "hot potato" with the claim, passing it through
25 five different adjusters and making "burdensome and duplicative

26 ² Michael K. Brisbin ("Brisbin"), counsel for Continental, filed a
27 declaration in support of its earlier motion. ECF No. 17. Brisbin
28 attaches to his declaration what he declares to be the Policy.
Because Essex does not dispute its authenticity and Essex's FAC
depends on its contents, the Court takes judicial notice of the
Policy.

1 requests for voluminous documents or information that had
2 previously been requested and provided multiple times, without
3 making a coverage decision." Id. During the two-year pendency of
4 its claim, Essex alleges that it incurred "hundreds of thousands of
5 dollars in attorneys' fees in the IndyMac Litigation." Id.

6 On October 7, 2010, Continental denied Essex's claim on the
7 grounds that Essex was not identified by name on the declarations
8 page of the Policy and there was no written property management
9 agreement between Essex and Continental. Id. ¶ 27.

10 On January 27, 2011, Essex commenced this action, seeking
11 declaratory relief that Continental owed a duty to defend it in the
12 IndyMac proceedings and alleging that Continental breached its
13 contract and the implied covenant of good faith and fair dealing
14 when it denied Essex's claim. ECF No. 1 ("Notice of Removal") Ex.
15 A ("Orig. Compl."). On Continental's motion to dismiss, the Court
16 dismissed Essex's declaratory relief claim as duplicative of its
17 breach of contract claim. ECF No. 25 ("May 9, 2011 Order") at 9.
18 The Court also dismissed Essex's bad faith claim for failure to
19 plead with the required specificity. ECF No. 25 ("May 9, 2011
20 Order") at 9. The Court granted Essex fifteen days' leave to amend
21 its complaint to include a properly pleaded bad faith claim. Id.

22 On May 24, 2011, Essex filed its FAC, which included the
23 above-mentioned allegations of Continental's alleged bad faith in
24 the claim determination process. See FAC. Essex alleged that
25 Continental consciously and unreasonably refused to grant its
26 claim, failed to make a timely ruling on its claim, failed to
27 properly investigate its claim, and embarked "on an interpretation
28 of the facts and policy provisions calculated to deprive Essex of

1 coverage" to "sav[e] money at Essex's expense." Id. ¶ 46. Essex
2 seeks damages "including attorneys' fees and expenses," as well as
3 punitive damages "to punish and make an example of Continental in
4 order to deter such conduct in the future." Id. ¶ 51.

5 On June 7, 2011, Continental filed the instant Motion. See
6 Mot. In it, Continental seeks dismissal of Essex's bad faith claim
7 as not plausible in light of the facts pleaded. Id. at 1.
8 Continental argues that Essex's allegation that Continental
9 improperly investigated Essex's claim is inconsistent with Essex's
10 allegation that Continental made "burdensome and duplicative"
11 document requests. Id. at 6. Continental argues that to the
12 extent Essex premises its bad faith claim on Continental's delay in
13 deciding the claim, Continental is protected by California's
14 genuine dispute rule. Id. at 8. Continental seeks dismissal with
15 prejudice of the bad faith claim. Id.

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17 **III. LEGAL STANDARD**

18 A motion to dismiss under Federal Rule of Civil Procedure
19 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
20 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
21 on the lack of a cognizable legal theory or the absence of
22 sufficient facts alleged under a cognizable legal theory.
23 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
24 1990). "When there are well-pleaded factual allegations, a court
25 should assume their veracity and then determine whether they
26 plausibly give rise to an entitlement to relief." Ashcroft v.
27 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
28 court must accept as true all of the allegations contained in a

1 complaint is inapplicable to legal conclusions. Threadbare
2 recitals of the elements of a cause of action, supported by mere
3 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950
4 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A
5 complaint need not contain "detailed factual allegations," but it
6 must provide more than an "unadorned, the-defendant-unlawfully-
7 harmed-me accusation." Id. at 1949. Thus, a motion to dismiss
8 should be granted if the plaintiff fails to proffer "enough facts
9 to . . . nudge[] [its] claims across the line from conceivable to
10 plausible." Twombly, 550 U.S. at 570.

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12 **IV. DISCUSSION**

13 The covenant of good faith and fair dealing "is implied as a
14 supplement to the express contractual covenants, to prevent a
15 contracting party from engaging in conduct that frustrates the
16 other party's rights to the benefits of the agreement." Waller v.
17 Truck Ins. Exch., Inc., 11 Cal. 4th 1, 36 (1995).

18 For Essex's bad faith claim to survive a Rule 12(b)(6) motion,
19 Essex must plead facts supporting a plausible claim that
20 Continental engaged in unreasonable conduct in connection with its
21 insurance claim. Century Sur. Co. v. Polisso, 139 Cal. App. 4th
22 922, 948 (Ct. App. 2006). This requires "something more than a
23 breach of the contract or mistaken judgment." Id. at 949. An
24 insurer's actions may be unreasonable if it delays deciding the
25 insured's claim for an unreasonable amount of time, fails to
26 conduct an adequate investigation, or resorts to "oppressive
27 conduct by claims adjusters seeking to reduce the amounts
28 legitimately payable." Waller, 11 Cal. 4th. at 36.

1 Essex alleges that Continental breached this covenant by,
2 inter alia, taking two years to deny Essex's claim, failing to
3 properly consider Essex's argument that it was insured as a
4 "Property Manager" under the Policy, ignoring "key evidence
5 establishing an immediate duty to defend," and by playing "hot
6 potato" with its claim by passing it from adjuster to adjuster "in
7 the hopes that Essex would eventually give up and not pursue its
8 valid claim." FAC ¶¶ 21-30.

9 Continental makes two arguments that these allegations are
10 insufficient to plead a plausible bad faith claim. It argues that
11 Essex's contention that Continental improperly investigated Essex's
12 claim is inconsistent with Essex's allegation that Continental made
13 "burdensome and duplicative" document requests. Id. at 6. Second,
14 it argues that to the extent Essex premises its bad faith claim on
15 Continental's delay in deciding the claim, Continental is protected
16 by California's genuine dispute rule. Id. at 8. Continental seeks
17 dismissal with prejudice of the bad faith claim. Id.

18 California's genuine dispute rule operates as an exception to
19 the general rule that an unreasonable delay in payment of benefits
20 due under an insurance policy gives rise to tort liability. Brehm
21 v. 21st Century Ins. Co., 166 Cal. App. 4th 1225, 1237 (Ct. App.
22 2008). It provides that an insurer that denies or delays payment
23 of benefits on the basis of a genuine dispute with the insured is
24 not liable in bad faith, although it might be liable for breach of
25 contract. Id.

26 Continental argues that there existed a genuine dispute as to
27 the validity of Essex's claim, as Essex was not a named insured
28 under the policy and no written property management agreement

1 between Essex and the Association had been produced. Mot. at 8.

2 The Court finds Continental's arguments to be unavailing. If
3 Essex's bad faith claim was premised solely on Continental's
4 alleged "burdensome and duplicative" document requests,
5 Continental's first argument might have some merit. But Essex also
6 alleges that Continental delayed deciding Essex's claim for two
7 years, ignored evidence and theories advanced by Essex, and passed
8 its claim from adjuster to adjuster in an attempt to induce Essex
9 to give up on its claim. The Court finds that when all of these
10 allegations are considered together, Essex's bad faith claim is
11 adequately pleaded. As for Continental's second argument under the
12 genuine dispute rule, while there may have been a genuine dispute
13 as to the validity of Essex's claim, this is an intensely factual
14 issue not suitable for resolution on a Rule 12(b)(6) motion. See
15 Wilson v. 21st Century Ins. Co., 42 Cal. 4th. 714, 726 (2007)
16 (triable issues of fact precluded summary judgment as to whether
17 genuine dispute rule applied to plaintiff's bad faith claim).

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19 **V. CONCLUSION**

20 For the foregoing reasons, the Court DENIES Defendant
21 Continental Casualty Company's Motion to Dismiss.

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23 IT IS SO ORDERED.

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25 Dated: August 30, 2011

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UNITED STATES DISTRICT JUDGE

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