

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEN TU, et al.,
Plaintiffs,
v.
DONGBU INSURANCE COMPANY,
LIMITED,
Defendant.

Case No. [17-cv-03495-JSC](#)

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 5

Plaintiffs Ken Tu, Sonnie Tu, and Eric Tu allege that Defendant Dongbu Insurance Company Limited breached an insurance policy contract when it denied coverage for losses allegedly sustained from the failure of the waste system at Plaintiffs’ restaurant. Defendant moves to dismiss Sonnie and Eric Tu because they are not parties to the contract. (Dkt. No. 5.) Plaintiffs have not filed an opposition to the motion. After reviewing Defendant’s brief and the insurance contract between the parties, the Court concludes that oral argument is unnecessary, see N.D. Cal. Civ. L. R. 7-1(b), and VACATES the July 27, 2017 hearing. As Sonnie and Eric do not plead that they are parties to the insurance policy, and the policy itself does not identify them as parties or third party beneficiaries, they do not have a contract with Defendant and thus no contract-based claims against it. Accordingly, Defendant’s motion to dismiss is GRANTED.

BACKGROUND

Defendant issued a two-year insurance policy to Plaintiff Ken Tu, effective February 13, 2015. (Dkt. No. 1 at 13.) Ken Tu is the only named insured. (Id.) The form of the insured business is “individual.” (Id.)

The waste system at Plaintiffs’ restaurant failed causing fumes to impact neighboring tenants and waste to contaminate the underlying soil. (Id. at 9.) Plaintiffs were forced to close the

1 restaurant. (Id.) Plaintiffs allege they tendered a timely claim to Defendant for the damage and
2 repair, loss of business income, and other insured losses. (Id.) Defendant denied coverage on July
3 8, 2016. (Id.) Plaintiffs allege the denial is a breach of the insurance policy. (Id.)

4 Plaintiffs brought a lawsuit in the Superior Court of the State of California for the County
5 of Contra Costa for breach of contract and “bad faith denial of insurance benefits.” (Id. at 7, 8.)
6 Defendant removed to federal court pursuant to 28 U.S.C. Section 1332. (Id. at 2.) Plaintiffs are
7 citizens of California, Dongbu is a citizen of Hawaii and Korea, and the losses from the alleged
8 breach of contract exceed \$75,000. (Id. at 2-3.)

9 **DISCUSSION**

10 Pursuant to Rule 12(b)(6), Defendant moves to dismiss Plaintiffs Sonnie and Eric Tue
11 because they failed to state two claims: (1) breach of contract; and (2) breach of the covenant of
12 good faith and fair dealing.

13 **I. Breach of Contract**

14 A breach of contract claim necessarily begins with a contract. See *Troyk v. Farmers*
15 *Group, Inc.*, 171 Cal.App.4th 1305, 1352 (2009). The essential elements of a contract include: (1)
16 parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or
17 consideration. Cal. Civ. Code § 1550. To be entitled to damages for breach of contract, a
18 plaintiff must plead and prove (1) a contract; (2) plaintiff’s performance; (3) defendant’s breach;
19 and damages to plaintiff. *Troyk*, 171 Cal.App.4th at 1352. Because Sonnie and Eric Tu are not
20 parties to the policy agreement there is no contract between these parties and thus they do not have
21 a claim for breach of contract against Defendant. See, e.g., *Barnhart v. Points Development US*
22 *Ltd.*, 2016 WL 3041036 *3 (C.D. Cal. May 25, 2016); *Seretti v. Superior Nat. Ins. Co.*, 71
23 *Cal.App.4th* 920, 929 (1999); *Hatchwell v. Blue Shield of Calif.*, 198 *Cal.App.3d* 1027, 1034
24 (1988); *Austero v. National Cas. Co.*, 62 *Cal.App.3d* 511, 515 (1976)

25 **II. Breach of the Covenant of Good Faith and Fair Dealing**

26 “The law implies in every contract, including insurance policies, a covenant of good faith
27 and fair dealing.” *Wilson v. 21 Century Ins. Co.*, 42 *Cal.4th* 713, 720 (2007). “The implied
28 promise requires each contracting party to refrain from doing anything to injure the right of the

1 other to receive the agreement’s benefits. To fulfill its implied obligation, an insurer must give at
2 least as much consideration to the interests of the insured as it gives to its own interests. When the
3 insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to
4 liability in tort.” Id. (citing Frommoethelydo v. Fire Ins. Exchange, 42 Cal.3d 208, 214–215
5 (1986)). The duty of good faith and fair dealing “arises from and exists solely because of the
6 contractual relationship between the parties.” Jones v. Aentna Casualty & Surety Co., 26
7 Cal.App.4th 1717, 1722 (1994). As is explained above, there is no contract between
8 Defendant and Plaintiffs Sonnie and Eric Tu. Because there is no contract, the covenant of good
9 faith and fair dealing cannot apply. See id. at 1722 (one who is not party to the contract “has no
10 standing to enforce it or recover extracontractual damages for the wrong withholding of benefits to
11 the contracting party”).

12 Plaintiffs Sonnie and Eic Tu must be dismissed because they fail to state a claim upon
13 which relief can be granted.

14 **CONCLUSION**

15 For the reasons explained above, the Court GRANTS Defendant’s 12(b)(6) motion to
16 dismiss Plaintiffs Sonnie and Eric Tu from this action. The dismissal is without leave to amend as
17 amendment would be futile.

18 This Order disposes of Docket. No. 5.

19 **IT IS SO ORDERED.**

20 Dated: July 24, 2017

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23 JACQUELINE SCOTT CORLEY
24 United States Magistrate Judge
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