

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ANDREW T SCHMIDT and JESSICA
DUFRESNE,

Plaintiffs,

v.

Case No: 2:19-cv-41-FtM-29MRM

FEDNAT INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

This matter comes before the Court on defendant's Dispositive Motion to Dismiss Extra-Contractual Claims Under Federal Rules of Civil Procedure 12(c) (Doc. #35) filed on November 13, 2020. Plaintiffs filed a Response (Doc. #40) on December 7, 2020.

In the one-count First Amended Complaint (Doc. #14), plaintiffs seek monetary damages, interest, costs, and other relief for a breach of an insurance contract issued by a Write-Your-Own Program carrier participating in the National Flood Insurance Program and sued as the fiscal agent of the United States. Defendant filed an Answer and Affirmative Defenses (Doc. #17) on April 18, 2019. The deadline to amend the pleadings expired on July 17, 2019, and was not extended by the Amended or Second Amended Case Management and Scheduling Orders. (Docs. #22, 28, 31.) The pleadings are closed.

Pursuant to Rule 12(c), defendant seeks to dismiss all of plaintiffs' extra-contractual claims for attorney fees and interest as barred and/or pre-empted by federal law. A party may move for a judgment on the pleadings after the pleadings are closed. Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." Interline Brands, Inc. v. Chartis Specialty Ins. Co., 749 F.3d 962, 965 (11th Cir. 2014) (internal citation omitted).¹

In response, plaintiffs withdraw the request for an award of interest based "upon review of the authorities in Defendant's Motion". (Doc. #40, ¶ 5.) As the Eleventh Circuit has recognized that the "no-interest rule prohibits awards of prejudgment interest against Write-Your-Own companies administering the National Flood Insurance Program", Newton v. Capital Assur. Co., 245 F.3d 1306, 1310 (11th Cir. 2001), the Court will deem the request for interest withdrawn and deny the motion as moot.

¹ The Court notes, without further discussion, that "the requested relief is more akin to a motion to strike the request for attorney's fees and costs under Federal Rule 12(f)." Arevalo, at *3. As such, the motion must have been filed within 21 days after being served with the pleading at issue. Fed. R. Civ. P. 12(f)(2). In this case, the motion was filed more than a year and a half later.

As to fees and costs, defendant relies on cases that pre-date Newton, and decisions in other circuits, primarily the Fifth Circuit. Plaintiffs argue in response that courts have recently found that claims for fees and costs are plausible under the Equal Access to Justice Act. See, e.g., Shapiro v. Wright Nat'l Flood Ins. Co., No. 2:19-CV-679-FTM-38MRM, 2020 WL 224538, at *4 (M.D. Fla. Jan. 15, 2020). The undersigned has also previously determined that if certain assumptions are made, where defendant seeks reimbursement for defense costs from FEMA and an arrangement exists entitling defendant to reimbursement, that "it is at least plausible at this point in the litigation that attorney's fees may be paid from federal funds by FEMA." Arevalo v. Am. Bankers Ins. Co. of Fla., No. 2:19-CV-159-FTM-99UAM, 2019 WL 2476644, at *4 (M.D. Fla. June 13, 2019). See also Morrissey v. Wright Nat'l Flood Ins. Co., No. 5:19-CV-183-RH-MJF, 2019 WL 8063348, at *1 (N.D. Fla. Oct. 27, 2019) (citing Arevalo); Julian v. Am. Bankers Ins. Co. of Fla., No. 5:19-CV-450-RH-MJF, 2020 WL 6115151, at *1 (N.D. Fla. Jan. 14, 2020) (same). For this reason, the motion will be denied.

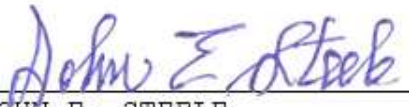
Accordingly, it is hereby

ORDERED:

Defendant's Dispositive Motion to Dismiss Extra-Contractual Claims Under Federal Rules of Civil Procedure 12(c) (Doc. #35) is

DENIED as moot as to the claim for interest, which is deemed **withdrawn**, and **DENIED** as to the claim of attorney's fees and costs in the First Amended Complaint.

DONE and ORDERED at Fort Myers, Florida, this 9th day of December, 2020.



JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record