STATE OF MINNESOTA DISTRICT COURT – CIVIL DIVISION

COUNTY OF OLMSTED THIRD JUDICIAL DISTRICT

Steven Owens,

Plaintiff,

vs.

State Farm Fire & Casualty Ins. Co.,

Defendant.

ORDER

Court File No. 55-CV-10-2283

The above-captioned matter came before the Honorable Joseph Chase, Judge of District Court, on June 28, 2010, at the Olmsted County Government Center in Rochester, Minnesota, on Defendant's motions to dismiss.

Peter Sandberg, of Sandberg & Sandberg, 4057 28th Street NW, Rochester, MN, 55901, appeared for and on behalf of Plaintiff Steven Owens.

Bjork T. Hill, of Hanson, Lulic & Krall, LLC, 700 Northstar East, 608 Second Ave. South, Minneapolis, Minnesota 55402, appeared for and on behalf of Defendant State Farm Fire and Casualty Insurance Company.

Based upon all of the files, records, proceedings, and argument of counsel, the Court makes the following Order:

IT IS HEREBY ORDERED THAT:

1. Defendant's motions to dismiss are DENIED.

The attached memorandum is incorporated by reference.

Dated: September 2, 2010.

BY THE COURT:

Joseph F. Chase
Judge of District Court

FILED
SEP 02 2010
COURT ADMINISTRATOR
Olmsted County, MN

MEMORNADUM

Factual Background

In this breach of contract dispute Plaintiff Steven Owens has filed suit against his homeowner's carrier, Defendant State Farm Fire and Casualty Insurance Company. The insurance policy in question covered Plaintiff's home and personal belongings located at 826 First Street SE, Rochester against theft and casualty loss. On or about November 23, 2007 several items of personal property were stolen from Plaintiff's garage. Plaintiff reported the matter to Defendant and sought reimbursement for the items taken. Defendant conducted an investigation into the matter, and eventually agreed to pay part of Plaintiff's claim. Via letters dated February 8, 2010 and February 16, 2010, Defendant denied a portion of Plaintiff's claim alleging insufficient documentation. Mr. Owens brought suit.

Defendant insurer is a foreign corporation headquartered in Bloomington, Illinois, that regularly conducts business in Minnesota. Defendant does not have a registered agent to accept service of process in Minnesota. Pursuant to Minn. Stat. §§ 60A.19 and 45.028, Plaintiff served his Summons and Complaint on the Minnesota Commissioner of Commerce (hereinafter "Commissioner") and sent a certified copy to Defendant on March 29, 2010. Plaintiff filed the Complaint -- which alleges breach of contract and requests declaratory relief -- with this Court on March 31, 2010. As is required under Minn. Stat. § 45.028, Plaintiff also filed an affidavit of compliance and sent a copy of the notice to Defendant.

On April 12, 2010, Defendant moved for dismissal under Minn. R. Civ. P. 12.02, alleging that service was improper and that the Complaint fails to state a claim upon which relief can be granted. Plaintiff responded on May 18, 2010, asserting that service was proper under Minn.

Stat. § 60A.19 because Defendant is a foreign insurance corporation, and that any defect in the pleadings can be remedied through amendment, and is not jurisdictional.

The Court heard oral argument from the parties on Defendant's motions on June 28, 2010 and the matter was placed under advisement on that date.

Legal Analysis

I. Is statutory substitute service available in this situation?

Defendant contends Plaintiff may not serve the Commissioner because the Defendant did not violate, and Plaintiff has not alleged that Defendant violated, any of the chapters enumerated in Minn. Stat. § 45.028 subd. 1 (2009). Defendant argues that the manner of service utilized by Plaintiff is only permitted where it is alleged that there has been a violation of Minnesota Statutes chapters 45 to 83, 155A, 309, 322, section 326B.802, or any rule or order under those chapters. As Plaintiff's Complaint alleges no such a violation, Defendant argues that the attempted service was ineffective, and this matter should be dismissed.

Plaintiff, on the other hand, asserts that this matter is a common-law breach of contract action against a foreign insurance company. He argues that service upon the Commissioner is permitted under Minn. Stat. § 60A.19 in such cases; and there is no requirement that Defendant have committed or that Plaintiff assert any violation of a statutory chapter listed in Minn. Stat. § 45.028, subd. 1.

Foreign insurance corporations are subject to the nearly identical (and seemingly duplicative) provisions of Minn. Stat. § 60A.19, Subdivision 1(3) and Subdivision 3. Subdivision 1(3) requires that a foreign insurance company doing business in Minnesota appoint the Commissioner "its lawful attorney in fact and therein irrevocably agree that legal process in any action or proceeding against it may be served upon [the Commissioner] with the same force

and effect as if personally served on it, so long as any of its liability exists in this state." Minn. Stat. § 60A.19 subd.1 (2009). Subdivision 3 provides:

> Before any corporation . . . issuing policies of insurance of any character and not organized or existing pursuant to the laws of this state is admitted to . . . transact the business of insurance in this state, it shall, . . . appoint the commissioner and successors in office it's true and lawful attorney, upon whom . . . summonses and all lawful processes *in any action or legal proceeding against it* may be served, and that authority thereof shall continue in force irrevocable as long as any liability of the company remains outstanding in this state.

Minn. Stat. § 60A.19 subd. 3 (2009).

Minn. Stat. § 60A.19, subd. 4 provides that "the service of process authorized by this section shall be made in compliance with section 45.028 subdivision 2."[1] Minn. Stat. § 45.028 subd. 2 states that "service of process under this section can be made on the commissioner by leaving a copy of the process in the office of the commissioner, or by sending a copy of the process to the commissioner by certified mail;" and requires that a copy of the process be sent by certified mail to the defendant and the court be provided with an affidavit of compliance. *Id*

If service of process is made in a manner not specifically authorized it is ineffective. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. App. 2000). When a party attempts to serve process upon a defendant by substitute service authorized by statute, the party must strictly adhere to the requirements of that statute. *Wood v. Martin*, 328 N.W.2d 723, 726 (Minn. 1983).

Defendant asserts that the phrase "under this section" in Minn. Stat. § 45.028 subd. 2 means that substitute service on the Commissioner is available only in cases in which: (A) the insurer has violated one of the statutory chapters listed in Minn. Stat. § 45.028 subd. 1, and; (B) the complaint so alleges. I am not persuaded.

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[1] Lest there be any question that foreign insurance companies are subject to substitute service in Minnesota, the legislature repeats this authorization at Minn. Stat. § 543.08: "If the defendant is a foreign insurance corporation, the summons may be served in compliance with section 45.028, subdivision 2."

Defendant's argument is flatly at odds with § 60A.19. When a foreign insurance company does business in Minnesota, the Commissioner is the company's attorney in fact for purposes of receiving service "in ***any*** action or proceeding against it." Minn. Stat. § 60A.19 subd. 1(3) (2009) (emphasis added). The present suit is an example of the most typical action brought by an insured against his/her insurance carrier -- one for failure to pay a loss allegedly covered under the policy. It is a common-law breach of contract claim. Hundreds of such purely common-law insurance coverage suits are brought every year in Minnesota. While it is conceivable that a statutory violation may also be implicated in some of these claims, it seems likely that the number of insured-versus-insurer suits that involve a statutory violation is vastly exceeded by those that have only a common-law basis. Acceptance of Defendant's position would mean that substitute service is *not* available for "*any* claim" against an out-of-state insurer as § 65A.19, subd. 1(3) provides. Indeed, it would be available only for a small, specialized fraction of those claims.

State Farm's own argument illustrates that its position would essentially gut § 60A.19's provision for substitute service "in *any* action or legal proceeding" against a foreign insurer. State Farm observes that: (1) many of the statutory chapters enumerated in § 45.028, subd. 1 have no application to insurance; (2) among those chapters that *are* insurance-related, only one is even arguably implicated in this garden-variety suit for payment of a denied insurance claim, and; (3) as to that chapter (Chapter 72A, the Unfair Claims Practices Act), no private cause of action is available. (Defendant's Memorandum of Law, pp. 5-6) In other words, there is no statutory cause of action available in this very typical case and therefore, according to State Farm, no possibility of substitute service. State Farm's interpretation of the law would render

substitute service unusable by Minnesota insureds in most suits against foreign insurance companies.

Defendant cites the unpublished cases of *Hadler v. White Bear Lake Ins. Co.*, 1998 WL 644307 and *Egge v. Depositors Ins. Co.*, 2007 WL 2703137 for the proposition that in order to use substitute service on the Commissioner, a violation of a provision listed in Minn. Stat. § 45.028, subd. 1 must be alleged in the complaint. Unpublished cases have, of course, no precedential value (Minn. Stat. § 480A.08, subd. 3), although their reasoning may be persuasive. In this case, I do not find that to be true.

In *Hadler*, the plaintiff had bungled service by mailing the summons and complaint rather than "leaving a copy of the process in the office of the commissioner." And he had attempted to serve the wrong insurer to boot. But the fundamental defect in the court's analysis in both *Hadler* and *Egge* is the failure to address § 60A.19. Those courts apparently gave no consideration to that statute's clear statement that substitute service on a foreign insurer is appropriate "in ***any*** action or legal proceeding." I suggest that there is no reported case law consistent with State Farm's argument for the simple reason that that position is plainly wrong. To the degree *Hadler* and *Egge* adopt that position, those cases are mistaken.[2]

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[2] State Farm's initial brief seeking dismissal fails even to mention Minn. Stat. § 60A.19 and that statute's reference to substitute service being available "in ***any*** action or proceeding against" a foreign insurer. In this writer's view, this is a significant and glaring omission. Attorneys are quite properly zealous advocates for their client's position and not, of course, required to do opposing counsel's job for him/her. But attorneys also have a duty of candor to the court. See Rule 3.3, Rules of Professional Conduct. The comment to that rule explains that "a lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."

I conclude that § 60A.19 is controlling here: With that conclusion counsel for State Farm disagrees, and I understand that. But it seems to me reasonably indisputable that § 60A.19 is "pertinent" to the question before the Court. State Farm's omission to mention that statute until compelled to do so in response to the insured's argument, strikes me as coming closer to a lack of frankness with the Court than should be comfortable for counsel. I suggest that legal argument which ignores, in the first instance, highly "pertinent" authority until the opposing party has brought that law to the Court's attention, is neither helpful to the Court nor persuasive.

There is nothing in § 60A.19 (or § 543.08) that would indicate substitute service is available for statutory claims but not for common-law suits against foreign insurers. Section 60A.19's reference to Minn. Stat. § 45.028, subd. 2 defines only the *procedure* by which service on a foreign insurance corporation is to be performed. Section 45.028, subd. 2 is solely and entirely a *procedural* provision that describes the manner and method of accomplishing effective service on the Commissioner. It begins with the accurate heading "**How made**." The substantive provisions State Farm seeks to invoke here are found entirely in § 45.028, *subd. 1* -- a provision *not* referred to by § 60A.19. State Farm's argument that the phrase "under this section" in § 45.028, subd. 2 effectively pulls into § 60A.19 the provisions of § 45.028, subd. 1 -- thereby eviscerating § 60A.19's "any action" provision -- stretches the statutory language beyond its breaking point.

I see no need here to construe the statute because I see no ambiguity in the legislature's expression of its intention: "In ***any*** *action* or legal proceeding" seems perfectly clear; and clear statutory language must be given its "plain meaning." *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998). But if statutory construction *were* necessary, "absurd results and unjust consequences" are to be avoided. *Swanson v. Brewster*, 784 N.W.2d 264, 274 (Minn. 2010). The reading (and result) State Farm advocates is absurd.

II. Should Plaintiff's Complaint be dismissed for failing to comply with Minn. R. Civ. P. 8.01 and Minn. Stat. § 544.36?

Defendant also moves for dismissal based on the fact that the Complaint indicates that Plaintiff seeks damages "in a sum less than Fifty thousand ($50,000) dollars." Minn. Stat. § 544.36 states: "In a pleading in a civil action which sets forth an unliquidated claim for relief, whether an original claim, cross-claim, or third-party claim, if a recovery of money is demanded in an amount less than $50,000, the amount shall be stated." Minn. R. Civ. P. 8.01 reiterates that

"If a recovery of money for unliquidated damages is demanded in an amount less than $50,000, the amount shall be stated." Minn. R. Civ. P. 8.01 (2010).

Plaintiff concedes that by failing to state a specific damage amount he has not complied with the statute and rule. The parties disagree about the implications of such non-compliance, however. Defendant contends that failing to state a specific damage request warrants dismissal under the theory that Plaintiff has failed to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e)(2010). Plaintiff counters that the failure to set forth a specific prayer for relief is not a jurisdictional error, but a procedural one properly remedied through amendment of the deficient pleading.

A party may move for dismissal based on failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e); but such a motion "serves an extremely limited function." *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). "The functions of a pleading today are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based, to permit the application of the doctrine of res judicata, and to determine whether the case must be tried by the jury or the court." *Id.* When a party seeks dismissal under Rule 12.02(c) "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Id.* When considering such a motion, the court "must treat the allegations in the complaint as true." *Weigland v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 811 (Minn. 2004). "A claim is sufficient against a motion to dismiss under Rule 12.02[e] if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief

demanded." *Northern States* at 29. "The law favors cases being decided on their true merits." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 426 (Minn. 1987).

In analyzing this motion with these considerations in mind, I conclude that dismissal is neither required nor justified. Minn. Stat. § 544.36 and Minn. R. Civ. P. 8.01 require a party seeking less than fifty thousand dollars in damages to claim a specific dollar amount; but those provisions mandate no specific sanction for failing to do so. No case has been brought to the Court's attention, and I have located none, indicating that this pleading oversight is jurisdictional and requires dismissal.

Permitting the Plaintiff to amend his Complaint to include a specific dollar figure less than fifty thousand dollars makes no fundamental change in the Plaintiff's claim that he was insured by Defendant and sustained a covered loss during the period of coverage. It does not require the parties to explore additional issues not previously raised. It cannot reasonably be argued that Defendant would be prejudiced by such an amendment.

In situations such as this "it is proper to place substance over form" and permit "amendment to correct" a pleading mistake. *Metro Bldg. Cos., Inc. v. Ram Bldgs., Inc.*, 783 N.W.2d 204, 209 (Minn. App. 2010). Dismissal here would "contravene the policy favoring adjudication of cases on their merits." *Id.* This is a "curable defect;" "dismissal is not required." *Id.*

Defendant's motion to dismiss for failure to state a claim upon which relief can be granted under Minn. Stat. § 544.36 and Minn. R. Civ. P. 8.01 is denied.

J.F.C.

Assistance with research and preparation provided by
Christopher Coon, J.D. and Emily Buchholz, J.D.