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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TROY AND PAULA BURLEY AND PAUL)	3:15-cv-00272-HDM-WGC
ACKERMAN AND JUDY ACKERMAN AS)	
TRUSTEES OF THE ACKERMAN FAMILY)	
TRUST, et al.,)	ORDER
)	
Plaintiffs,)	
)	
vs.)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH PA, a)	
subsidiary of AMERICAN)	
INTERNATIONAL GROUP, INC., and)	
DOES 1through 100, inclusive,)	
)	
Defendants.)	
)	

Before the court is defendant National Union Fire Insurance Company of Pittsburgh, PA's ("National Union") motion to dismiss for failure to state a claim(#5). Plaintiffs responded (#26) and defendant replied (#28). Also before the court is defendant's request for judicial notice in support of its motion to dismiss(#6). Plaintiffs responded (#25).

I. Request for Judicial Notice

A district court may take judicial notice of any fact not subject to reasonable dispute in that it is capable of accurate and ready

1 determination by resort to sources whose accuracy cannot reasonably
2 be questioned. FED. R. EVID. 201(b). This includes public records of
3 judicial proceedings that are not subject to reasonable dispute when
4 those proceedings relate to matters at issue. *Harris v. Cty. of*
5 *Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012); *Holder v. Holder*, 305
6 F.3d 854, 866 (9th Cir. 2002); *Lee v. City of Los Angeles*, 250 F.3d
7 668, 689-91 (9th Cir. 2001). However, “[a]s a general rule, a court
8 may not take judicial notice of proceedings or records in another
9 cause so as to supply, without formal introduction of evidence, facts
10 essential to support a contention in a cause then before it.” *M/V Am.*
11 *Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491 (9th Cir.
12 1983).

13 Defendant requests that the court take judicial notice of the
14 August 13, 2012 order of the United States Bankruptcy Court for the
15 Central District of California (#6 Ex. 1). Plaintiffs do not oppose
16 the request “to the extent that Plaintiffs acknowledge that an Order
17 Granting Motion for Relief from the Automatic Stay was issued in the
18 U.S. Bankruptcy Court” that permitted Plaintiffs to “pursue the
19 insurance of Padilla Construction Company of Nevada for payment of a
20 final judgment in [the state court case] based upon assignment by
21 Silverstar to Plaintiffs.” (#25 at 2). Accordingly, the court takes
22 judicial notice of this public record to the extent set forth above.

23 Defendant also requests that the court take judicial notice of
24 Padilla Construction Company’s opening brief appealing plaintiffs’
25 state court judgment filed on May 13, 2015. (#6 Ex. 2). Plaintiffs
26 object to this request because the opening brief was stricken from the
27 record by the Nevada Supreme Court on July 6, 2015. (#25 at 2). The
28 defendant’s request is denied.

1 **II. Motion to Dismiss**

2 In considering a motion to dismiss under Federal Rule of Civil
3 Procedure 12(b)(6), the court must accept as true all material
4 allegations in the complaint as well as all reasonable inferences that
5 may be drawn from such allegations. *W. Ctr. for Journalism v.*
6 *Cederquist*, 235 F.3d 1153, 1154 (9th Cir. 2000). The allegations of
7 the complaint also must be construed in the light most favorable to
8 the nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th
9 Cir. 2000).

10 The court need not, however, accept as true those allegations
11 that (1) contradict matters properly subject to judicial notice; (2)
12 are conclusory allegations of law, mere legal conclusions, unwarranted
13 deductions of fact, or unreasonable inferences; (3) are contradicted
14 by documents referred to in the complaint; or (4) are internally
15 inconsistent. *Shwarz*, 234 F.3d at 435; *Pareto v. F.D.I.C.*, 139 F.3d
16 696, 699 (9th Cir. 1998); *Clegg v. Cult Awareness Network*, 18 F.3d
17 752, 754-55 (9th Cir. 1994); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th
18 Cir. 1994), *rev'd on other grounds by Galbraith v. Cty. of Santa*
19 *Clara*, 307 F.3d 1119 (9th Cir. 2002); *W. Mining Council v. Watt*, 643
20 F.2d 618, 624 (9th Cir. 1981); *Response Oncology, Inc. v. MetraHealth*
21 *Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997).

22 The purpose of a motion to dismiss under Federal Rule of Civil
23 Procedure 12(b)(6) is to test the legal sufficiency of the complaint.
24 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court can
25 grant the motion only if it is certain that the plaintiff will not be
26 entitled to relief under any set of facts that could be proven under
27 the allegations of the complaint. *Cahill v. Liberty Mut. Ins. Co.*,
28 80 F.3d 336, 338 (9th Cir. 1996).

1 **A. Background**

2 This action arises out of a state court construction defect case.
3 Silverstar Development/Village 15 at Arrowcreek, LLC and Chantalaine
4 A.C., LLC ("Silverstar"), a defendant in the state case, filed a third
5 party complaint and cross claim against Padilla Construction Company
6 of Nevada ("Padilla"), a subcontractor who performed work for
7 Silverstar. Following this filing, Padilla filed for Chapter 11
8 bankruptcy protection. Prior to the trial, Silverstar received an
9 order from the United States Bankruptcy Court for the Central District
10 of California, granting Silverstar the express ability to enforce any
11 judgment against Padilla by "[c]ollecting upon any available
12 insurance."

13 Plaintiffs allege that in the state court action, they entered
14 into a settlement with Silverstar that included the assignment to
15 plaintiffs by Silverstar and Silverstar's insurer, Clarendon America
16 Insurance Company, all of Silverstar's claims for relief asserted
17 against Padilla. Plaintiffs further allege that they obtained a
18 verdict in the case and were awarded a \$588,888.82 judgment against
19 Padilla. Defendant National Union is Padilla's insurer in the
20 underlying state court case. Plaintiffs allege that the defendant has
21 refused or otherwise failed to pay the state court judgment.

22 **B. Analysis**

23 Plaintiffs' second amended complaint (#1 at 7-17) alleges four
24 causes of action: (1) declaratory relief; (2) satisfaction and
25 enforcement of judgment; (3) breach of duty of good faith and fair
26 dealing; and (4) breach of Nevada insurance laws/statutory bad faith.
27 Defendant moves to dismiss all causes of action. The parties agree
28 that Nevada law applies. (#5; #26 at 7).

1 1. Declaratory Relief and Satisfaction and Enforcement of
2 Judgment

3 Defendant argues that plaintiffs' claims for declaratory relief
4 and satisfaction and enforcement of judgment should be dismissed as
5 premature. (#5 at 7). Defendant contends that, because the state
6 court judgment is being appealed, the judgment is not final and can
7 be reversed or modified. (*Id.*).

8 Plaintiffs contend that their claims are ripe for determination
9 because defendant failed to follow the procedures for postponing the
10 commencement of a judgment. (#26 at 8). Specifically, plaintiffs
11 rely on NRCP 62(d), which allows an appellant to post a supersedeas
12 bond to stay of the execution of a judgment, and NRAP 8(a)(1)(B),
13 which provides that a party must first move in the district court for
14 approval of a supersedeas bond to stay the execution of a judgment
15 pending appeal. (*Id.*). Thus, as defendants have not posted a
16 supersedeas bond, plaintiffs argue that their claims regarding the
17 final judgment obtained against Padilla in state court are ripe. (*Id.*
18 at 8-10).

19 "[U]nder Nevada law, declaratory relief between a third party
20 claimant and an insurer is proper only after the third party obtains
21 a tort judgment against the tortfeasor." *Vignola v. Gilman*, 804 F.
22 Supp. 2d 1072, 1077 (D. Nev. 2011) (citing *Knittle v. Progressive Cas.*
23 *Ins. Co.*, 112 Nev. 8, 908 P.2d 724, 726 (1996)). The third party
24 claimant's rights against a tortfeasor's insurer mature when the
25 claimant obtains a judgment against the tortfeasor. *Roberts v.*
26 *Farmers Ins. Co.*, 91 Nev. 199, 533 P.2d 158, 159 (1975). As such, a
27 tort claimant "can assert no legally protectible interest" until the
28 claimant establishes the tortfeasor's liability by obtaining a tort

1 judgment against the tortfeasor. *Knittle*, 908 P.2d at 726.

2 Here, plaintiffs have a justiciable claim for declaratory relief
3 against Padilla's insurer, defendant National Union. Plaintiffs'
4 second amended complaint alleges that, as assignees of Silverstar,
5 they obtained a judgment in the underlying state court case. Thus,
6 plaintiffs have a claim against defendant for declaratory relief and
7 satisfaction and enforcement of judgment as the underlying tort suit
8 resulted in a final judgment. Pursuant to NRC 62(d), a stay of
9 execution of a judgment becomes effective once the supersedeas bond
10 is filed. The defendant has not posted a supersedeas bond to stay the
11 execution of the judgment in the underlying state court case.
12 Accordingly, the court denies defendant's motion to dismiss
13 plaintiffs' claims for declaratory relief and satisfaction and
14 enforcement of judgment.

15 2. Breach of Good Faith and Fair Dealing

16 Defendant argues that plaintiffs lack standing to sue for bad
17 faith. First, defendant asserts that while plaintiffs were assigned
18 the ability to "enforce any judgment" obtained against Padilla by
19 "[c]ollecting upon any available insurance," that does not include an
20 assignment of Padilla's rights. (#5 at 7-8). Second, defendant
21 argues that it does not owe a duty of good faith and fair dealing
22 towards the alleged creditors of its insured. (*Id.* at 8). Finally,
23 defendant contends that even if plaintiffs had standing to sue for bad
24 faith, their claims would fail because they have failed to allege
25 facts to support their claim. (*Id.* at 8-10).

26 Plaintiffs have not cited any case in which a third party
27 claimant was allowed to directly proceed against their tortfeasor's
28 insurer for a breach of good faith and fair dealing. Nonetheless,

1 plaintiffs assert that they have standing to bring bad faith claims
2 pursuant to Federal Rule of Civil Procedure 18(a).¹ (#26 at 10).

3 In Nevada, third parties cannot bring breach of good faith and
4 fair dealing claims against a tortfeasor's insurance company because
5 they have no contractual relationship with the insurer. See *Gunny v.*
6 *Allstate Ins. Co.*, 108 Nev, 344, 830 P.2d 1335, 1336 (1992); see also
7 *Tweet v. Webster*, 610 F. Supp. 104, 106 (D. Nev. 1985) (noting that
8 Nevada courts have refused to extend insurance company's liability to
9 a third party absent the special element of reliance). Liability for
10 bad faith is tied to the covenant of good faith and fair dealing
11 arising out of an underlying contractual relationship. *United Fire*
12 *Ins. Co. v. McClelland*, 105 Nev. 504, 750 P.2d 193, 197 (1989). As
13 such, "[w]hen no contractual relationship exists, no recovery for bad
14 faith is allowed." *Id.* However, the Nevada Supreme Court has
15 suggested that there is an exception if the third party is a specific
16 intended beneficiary of the policy or has relied to its detriment on
17 the representations made by the insured. *Beregerud v. Progressive*
18 *Cas. Ins. Co.*, 453 F. Supp 2d 1241, 1247-48 (D. Nev. 2006); *Vignola*,
19 804 F.2d at 1076.

20 Plaintiffs' second amended complaint fails to allege the
21 existence of a contractual relationship between plaintiffs and
22 defendant. Rather, plaintiffs are third party claimants against
23 defendants' insurance policy with Padilla. Plaintiffs do not allege
24 that they are specific intended beneficiaries or that they
25 detrimentally relied on defendant's representations. Thus, under
26 Nevada law, plaintiffs do not have standing to bring a claim of bad

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28 ¹ Rule 18(a) concerns joinder of claims, rather than standing to
sue for bad faith.

1 faith against defendant. The court, therefore, grants defendant's
2 motion to dismiss as to plaintiffs' breach of good faith and fair
3 dealing claims.

4 3. Breach of Nevada Insurance Laws/Statutory Bad Faith

5 Defendant argues that plaintiffs also lack standing to sue for
6 unfair claims practices. Defendant states that plaintiffs were only
7 assigned the ability to "enforce any judgment" obtained against
8 Padilla, which it argues does not include the right to sue for unfair
9 claims practices. Additionally, defendant argues that plaintiffs do
10 not allege that the Unfair Claims Practices Act provides a cause of
11 action to a third party claimant who is suing the insured. Moreover,
12 even if plaintiffs were to have standing, defendant maintains that
13 they have not alleged facts to support their claim as they have not
14 alleged that Padilla suffered any damages as a result of any alleged
15 violation. Plaintiffs do not address defendant's standing argument,
16 but argue generally that they have alleged facts sufficient to support
17 their claims for unfair claims practices. (#26 at 10-13).

18 Under Nevada's Unfair Claims Practices Act, NRS 686A.310, an
19 insurer is liable for engaging in certain unfair practices. The Act
20 makes an insurer liable to the insurance commissioner and "to its
21 insured for any damages sustained by the insured as a result of the
22 commission of any act set for in subsection 1 as an unfair practice."
23 NEV. REV. STAT. 686A.310(2).

24 In *Tweet v. Webster*, 614 F. Supp. 1190, 1195 (D. Nev. 1985), this
25 Court held that third party claimants have no private cause of action
26 under NRS 686A.310. See also *Crystal Bay Gen. Improvement Dist. v.*
27 *Aetna Casualty & Surety Co.*, 713 F. Supp. 1371, 1376 (D. Nev. 1989)
28 (holding that NRS 686A.310 creates no cause of action for a third

1 party claimant against an insurer). The Nevada Supreme Court
2 subsequently agreed in *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 830
3 P.2d 1335, 1336 (1992) (citing *Crystal Bay*, 713 F. Supp. at 1377).

4 As previously discussed, plaintiffs have not alleged that they
5 are covered as insureds under the policy or that they have a
6 contractual relationship with the defendant. Therefore, plaintiffs
7 have not alleged sufficient facts to establish standing to assert a
8 claim under NRS 686A.310. Accordingly, the court grants defendant's
9 motion to dismiss as to plaintiffs' statutory bad faith claims.

10 4. Punitive Damages

11 Defendant argues that plaintiffs' claim for punitive damages
12 should be dismissed and/or stricken because the only possible basis
13 for awarding punitive damages fails as a matter of law. (#5 at 11-
14 14). On the other hand, plaintiffs argue that, as they "have properly
15 asserted their cause of action for bad faith, the trier of fact could
16 reasonably determine that National Union's conduct amounts to a
17 conscious disregard of the rights of Plaintiffs/insured." (#26 at
18 15).

19 Even though punitive damages are a remedy, and not a claim,
20 plaintiffs must still plead facts to support an award of punitive
21 damages in order to maintain a prayer for them in their complaint.
22 In Nevada, punitive damages are available "where it is proven by clear
23 and convincing evidence that the defendant has been guilty of
24 oppression, fraud, or malice, express or implied." NEV. REV. STAT.
25 § 42.005(1). By this order, the court has dismissed the breach of
26 good faith claim. Punitive damages are not available for the
27 remaining claims, declaratory relief and satisfaction and enforcement
28 of judgment. Therefore, plaintiffs are not entitled to recover

1 punitive damages as a matter of law. Accordingly, defendant's request
2 to dismiss plaintiffs' prayer for punitive damages is **GRANTED**.

3 5. Attorneys' Fees

4 Finally, defendant moves to dismiss and/or strike plaintiffs'
5 request for attorneys' fees. Defendant argues that Nevada generally
6 follows the "American Rule" under which each party must bear their own
7 attorneys' fees. (#5 at 14). Defendant also asserts that plaintiffs
8 have not cited any statute, rule, or contractual provision under which
9 recovery for attorneys' fees is possible. (*Id.*).

10 Plaintiffs explain that they may be entitled to attorneys' fees
11 and costs as the prevailing party, pursuant to the applicable
12 insurance policy, and under their common law bad faith claims. (#26
13 at 17). Because plaintiffs contend that the defendant has not
14 provided the applicable insurance policy, they argue that the Court
15 cannot make any determinations regarding the fees recoverable under
16 the policies. (*Id.*). Additionally, plaintiffs contend that the state
17 court awarded them \$228,696.12 in attorney's fees and costs in the
18 underlying state court action. (*Id.*).

19 A court may grant a motion to strike pursuant to Federal Rule of
20 Civil Procedure 12(f) if the contested language constitutes an
21 "insufficient defense or any redundant, immaterial, or scandalous
22 matter." The attorney's fees and costs awarded in the underlying
23 state court action are part of the first and second causes of action
24 for relief for declaratory judgment and satisfaction and enforcement
25 of judgment. As such, they are not recoverable under a request for
26 attorneys' fees in this case. Additionally, by this order the court
27 dismissed plaintiffs' claims for bad faith. As plaintiffs have not
28 pled a basis for the recovery of attorneys' fees, the court will **GRANT**

1 defendant's request to strike plaintiffs' request for attorneys' fees.

2 **C. Amendment**

3 Plaintiffs state that they will be seeking leave in order to file
4 a third amended complaint "to provide more detailed facts that have
5 come to light since the filing of the original complaint." (#26 at
6 11 & n.7).

7 Pursuant to Federal Rule of Civil Procedure 15(a)(2), "the court
8 should freely give leave [to amend] when justice so requires."
9 However, leave to amend "is not to be granted automatically." *In re*
10 *W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th
11 Cir. 2013). The court "considers the following five factors to assess
12 whether to grant leave to amend: (1) bad faith, (2) undue delay, (3)
13 prejudice to the opposing party, (4) futility of amendment, and (5)
14 whether plaintiff has previously amended the complaint. *Id.* The
15 court will grant plaintiffs leave to amend their second amended
16 complaint if plaintiffs can allege that they are a named insured or
17 specific intended beneficiaries under the terms of the insurance
18 policy. Additionally, plaintiffs may amend their complaint to restore
19 their request for punitive damages and attorneys' fees if they can
20 demonstrate a basis for recovery consistent with this order.

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1 In accordance with the foregoing, defendant's motion to dismiss
2 (#5) is hereby **GRANTED WITH LEAVE TO AMEND** as to the breach of good
3 faith and fair dealing, statutory bad faith, punitive damages, and
4 attorneys's fees. In all other respects, the motion to dismiss is
5 **DENIED.**

6 IT IS SO ORDERED.

7 DATED: This 5th day of February, 2016.

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Howard D McKelvey

UNITED STATES DISTRICT JUDGE

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