

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SABLE ANGELICA MACHADO,
Plaintiff

: No. 3:16cv1685
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:
: (Judge Munley)

v.

SAFECO INSURANCE COMPANY
OF ILLINOIS and
JOHN DOES 1-10,
Defendants

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MEMORANDUM

Before the court for disposition is defendants' motion to dismiss portions of the plaintiff's complaint regarding mishandling of an insurance claim. The matter has been fully briefed and is ripe for disposition.

Background

Plaintiff Sable Angelcia Machado (hereinafter "plaintiff") owned a house located at 238 Braiside Avenue, East Stroudsburg, PA. (Doc. 1, Compl. ¶ 6). A homeowner's policy of insurance issued by Defendant Safeco Insurance covered the property. (Id.) On August 14, 2015, fire destroyed the house and plaintiff's personal belongings stored therein. (Id. ¶ 7). Plaintiff made a claim on her homeowner's policy for the loss she experienced.

Safeco Investigator Defendant David Klitsch contacted plaintiff on

August 15, 2015, and demanded that they meet at plaintiff's property on August 18, 2015. (Id. ¶ 10). Plaintiff met the Safeco investigator on August 18, 2015. (Id. ¶ 13). The investigator asked accusatory questions and acted hostilely and aggressively. (Id.) Four times during the meeting, Klitsch accused plaintiff, without any basis, of setting the fire herself. (Id. ¶ 14). Klitsch made other erratic and baseless accusations. (Id. ¶ 15). For example, he accused plaintiff of not being home enough; of not having enough clothes; having another home in New Jersey; and never living in the property. (Id.) He also accused plaintiff's roommates of avoiding him. (Id. ¶ 16). During the meeting, Klitsch implied that Safeco would find a way to deny the claim by indicating, in a threatening manner, that if defendants found plaintiff uncooperative, they would deny her claim. (Id. ¶ 17).

For approximately three weeks after the meeting, Klitsch investigated the fire each day. (Id. ¶ 18). Safeco never revealed the results of the investigation to plaintiff. (Id.)

Plaintiff alleges other abusive treatment during the claims handling procedure. For example, Safeco scheduled to take her statement, which was to last several hours, in a driveway on a very hot, ninety-degree day.

(Id. at ¶ 20). During the statement, which eventually took place at an office, the interviewer was aggressive, accusatory and badgering. (Id. ¶ 22). Then a month and a half later, Safeco required a second recorded statement. (Id. ¶ 23).

Finally, on February 23, 2016, Safeco denied plaintiff's claim indicating that plaintiff had violated the "Concealment or Fraud Condition" contained in the policy. (Id. ¶ 29). Plaintiff concealed no information from Safeco and did not commit fraud. (Id. ¶ 30). The basis of the denial of insurance benefits is false and baseless. (Id.)

Plaintiff alleges that she suffered personal property loss of \$76,662.69 and that an adjustment company concluded that the cost to rebuild the dwelling would be over \$437,000. (Id. ¶ 33). She also avers that she suffered severe, ongoing emotional distress. (Id. ¶ 34).

Based upon these facts, plaintiff filed the instant five-count complaint. The complaint's five counts are as follows: 1) Bad faith; 2) Negligence; 3) Violation of the Unfair Trade Practices and Consumer Protection Law; 4) Breach of contract/covenant of good faith and fair dealing; and 5) Breach of fiduciary duty. Defendants have moved to dismiss several of these counts, bringing the case to its present posture.

Jurisdiction

Plaintiff asserts this court's jurisdiction pursuant to the diversity jurisdiction statute, 28 U.S.C. § 1332. (Doc. 1, Compl. ¶ 1). Because we are sitting in diversity, the substantive law of Pennsylvania shall apply to the instant case. Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

Standard of review

This case is before the court pursuant to defendants' motion to dismiss for failure to state a claim upon which relief can be granted filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. When a 12(b)(6) motion is filed, the sufficiency of the allegations in the complaint is tested. Granting the motion is appropriate if, accepting as true all the facts alleged in the complaint, the plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," or put another way, "nudged [his or her] claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Third Circuit interprets Twombly to require the plaintiff to describe "enough facts to raise a reasonable expectation that discovery will reveal evidence of" each necessary element of the claims alleged in the complaint. Phillips v. Cty.

of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 556). Moreover, the plaintiff must allege facts that “justify moving the case beyond the pleadings to the next stage of litigation.” Id. at 234-35.

In relation to Federal Rule of Civil Procedure 8(a)(2), the complaint need only provide “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Twombly, 550 U.S. at 555 (citation omitted). “[T]he factual detail in a complaint [cannot be] so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8.” Phillips, 515 F.3d at 232 (citation omitted). “Rule 8(a)(2) requires a ‘showing’ rather than a blanket assertion of an entitlement to relief.” Id.

The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)(6) motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997). To decide a motion to dismiss, a court generally should

consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

Discussion

Defendants filed a motion to dismiss the following from plaintiff's complaint: Count II-negligence; Count III-Unfair Trade Practices and Consumer Protection Law (hereinafter "UTPCPL"); Count V-breach of fiduciary duty; and claims for costs, attorney fees and punitive damages in Counts II and IV. In response to the motion to dismiss, the plaintiff concedes the dismissal of all issues raised by the defendants except for Count III - the UTPCPL claim - and the attorney fees, costs and punitive damages claim in Count IV. We will address these two issues separately.

I. Count III - UTPCPL

Count III of plaintiff's complaint asserts a cause of action under the UTPCPL. It incorporates by reference the prior paragraphs of the complaint and asserts that the claims handling conduct that defendants engaged in constitutes "unfair or deceptive practice" within the meaning of

the UTPCPL. Plaintiff seeks treble damages and attorney's fees under this statute. Defendants argue that the facts alleged do not fall under the UTPCPL.

The Pennsylvania UTPCPL prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." 73 PA. STAT. § 201-3. Plaintiff is unclear as to which section of the UTPCPL she asserts that the defendants violated. She merely incorporates all the facts set forth in the complaint and asserts that they were a violation of the UTPCPL. The facts alleged in the complaint deal with the claims handling/denial by the defendants.

In the insurance context, the UTPCPL applies only to conduct related to the sale of an insurance policy, not to the handling of insurance claims. "Mere refusal to pay a claim, or failure to investigate or take other action, is nonfeasance and is, thus, not actionable [under the UTPCPL]." Nordi v. Keystone Health Plan West, Inc., 989 A.2d 376, 385 (Pa. Super. Ct. 2010); Kelly v. Progressive Advanced Ins. Co., 159 F. Supp. 3d 562, 564 (E.D. Pa. 2016) (explaining that an insured may not bring an action under the UTPCPL "based on the insurer's failure to pay a claim or to investigate a

claim.”).¹

Accordingly, because plaintiff complains about the claims handling and not the sale of the insurance policy, she cannot assert a cause of action under the UTPCPL. Count III of the complaint will be dismissed.

II. Count IV - punitive damages and attorney’s fees

The other contested portion of the defendants’ motion to dismiss involves plaintiff’s claim for attorney’s fees, costs and punitive damages under Count IV, which is the breach of contract cause of action. We will address each issue separately.

A. Attorney’s Fees

Under the breach of contract claim, plaintiff seeks attorney’s fees as a remedy. Such a remedy is not available. Under Pennsylvania law, counsel fees generally are not available except by agreement of the parties or where a statutory or contractual basis for such relief exists. Lucchino v.

¹Plaintiff cites Berg v. Nationwide Mut. Ins. Co., Inc., 44 A.3d 1164 (Pa. Super. Ct. 2012) for the proposition that the UTPCPL applies to claims handling as well as to the purchase/solicitation of an insurance policy. Berg, however, did not address that issue. Berg dealt with whether a finding of a UTPCPL violation is evidence of bad faith under 42 PA. CONS. STAT. ANN. § 8371. See Romero v. Allstate, Civ. No. 16-4037; 2017 WL 895593 *4 n.2 (E.D. Pa. Mar. 7, 2017) (explaining that Berg does not provide for a *separate cause of action* for a UTPCPL violation, but that such violation may constitute *evidence* to support a bad faith cause of action.).

Comm. of Pa., 809 A.2d 264, 282 (Pa. 2002). Here, plaintiff cites to no agreement or statute which provides for attorney's fees as a remedy for a breach of contract. Thus, the attorney fee claim in Count IV will be dismissed.

B. Costs

Plaintiff also seeks "costs" under Count IV. Defendants move to dismiss this element of damages. Plaintiff points out, however, that costs are provided for in Rule 54 of the Federal Rules of Civil Procedure. We agree. Rule 54 provides: "Unless federal statute, these rules, or a court order provides otherwise, costs - other than attorney's fees - should be allowed to the prevailing party." FED. R. CIV. P. 54. Accordingly, we will not dismiss the plaintiff's request for "costs".

C. Punitive damages

Plaintiff also seeks punitive damages under the breach of contract claim in Count IV. Under Pennsylvania law, punitive damages are not available solely for a breach of contract. Nicholas v. Pa. State Univ., 227 F.3d 133, 147 (3d Cir. 2000). Accordingly, the claim for punitive damages in Count IV will be dismissed.

Conclusion

Based upon the above reasoning, the motion to dismiss will be granted with regard to Count III and with regard to punitive damages and attorney's fees under Count IV. The motion to dismiss "costs" as a potential remedy will be denied. Additionally, the following counts will be dismissed because the plaintiff concedes that they should be dismissed: Count V-breach of fiduciary duty; Count II-negligence; and claims for attorney's fees and punitive damages in Counts II and IV. Remaining in the case are Count I, Bad Faith and Count IV, Breach of Contract. An appropriate order follows.

Date: 4/7/17

s/ James M. Munley
JUDGE JAMES M. MUNLEY
UNITED STATES DISTRICT COURT