American National Property and Casualty Company v. Stutte et al Doc. 40

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, ***Plaintiff*, *Counter-Defendant*,** **v.** **CAROL ANN STUTTE; LAURA JEAN STUTTE,** ***Defendants*, *Counter-Plaintiffs*,** **and** **CHASE HOME FINANCE, LLC,** ***Defendant*.**	**CIVIL ACTION NO. 3:11-CV-219**

REPLY IN SUPPORT OF THE STUTTES' MOTION FOR LEAVE TO FILE SECOND AMENDED COUNTERCLAIM

The opposition of Plaintiff/Counter-Defendant American National Property & Casualty Company ("ANPAC") to the Stuttes' Motion for Leave to File a Second Amended Counterclaim fails for two independent reasons – and it unintentionally undermines ANPAC's pending motion for partial summary judgment, all as discussed below.

ANPAC's opposition fails first because ANPAC does not and cannot dispute that newly discovered facts provide additional support for the Stuttes' *existing* counterclaims of bad faith refusal to pay an insured loss and violation of the Tennessee Consumer Protection Act ("TCPA"). ANPAC's opposition fails second because ANPAC is wrong on the law when it argues that the Stuttes' claims for negligent and intentional infliction of emotional distress would be futile. But perhaps the most important lesson one takes from ANPAC's paper is that

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discovery is necessary because there are deep disputes over whether ANPAC was acting in good faith or was intentionally trying to railroad the Stuttes, as seems more apparent with each new fact.

Under the liberal amendment standard of Federal Rule of Civil Procedure 15(a), leave to amend the Stuttes' pleading should therefore be granted.

The New Facts are Relevant to the Existing Counterclaims and May Be Pleaded

ANPAC does not dispute that the newly discovered facts pleaded by the Stuttes provide additional support for their existing counterclaims for bad faith and violation of the TCPA. These newly discovered facts include that ANPAC conducted a shoddy and one-sided investigation because (a) it has ignored the Stuttes' October 8, 2010 cell phone bill, which plainly indicates that the Stuttes were in the Nashville area before, during and after the September 4, 2010 fire that destroyed their home, contrary to the conclusion of ANPAC's purported cell phone expert, and (b) its private investigator turned a blind eye to important exculpatory evidence, including cell phone bills and time-stamped digital photographs, offered by a witness, Lora Lee Black, who accompanied the Stuttes on their trip to Nashville.[1]

ANPAC's sole objection to the Stuttes' Motion for Leave is that the new counterclaims the Stuttes seek to add – negligent and intentional infliction of emotional distress – are futile because such causes of action are not recognized in Tennessee.[2] Even if ANPAC's assertion were true (and it is not, as discussed below), it would not affect whether the Stuttes should be permitted to plead additional facts to support their *existing* counterclaims. As set forth more

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[1] These allegations are set forth in paragraphs 26-34 and 51-52 in the Stuttes' proposed Second Amended Counterclaim. (*See* Dkt. No. 37-1.)

[2] The Stuttes' claims for negligent and intentional emotional distress are set forth in paragraphs 54-73 in the proposed Second Amended Counterclaim. (*See* Dkt. No. 37-1.)

fully in the Stuttes' Supplemental Memorandum in Opposition to ANPAC's Motion for Partial Summary Judgment (Dkt. No. 36) and the Stuttes' Motion for Leave (Dkt. No. 37), the Stuttes' ongoing investigation has uncovered additional evidence that ANPAC's investigation was incompetent, deceptive, biased, and unfair – evidence which is clearly relevant to the Stuttes' bad faith and TCPA claims. ANPAC offers no reason why amendment is inappropriate as to these existing claims.

Tennessee Law Recognizes the Stuttes' New Tort Claims

ANPAC's sole objection to the Stuttes' Motion for Leave – that the requested amendment "is futile because Tennessee does not recognize the cause of action [the Stuttes] attempt to assert" – is plainly incorrect. ANPAC's Resp. at 4 (Dkt. No. 38). Courts applying Tennessee law have repeatedly made clear that an insured may assert claims against an insurer for the infliction of emotional distress where the conduct alleged goes beyond an insurer's mere refusal to pay an insurance claim. *See, e.g.*, *Mathis v. Allstate Ins. Co.*, 959 F.2d 235 (6th Cir. 1992) (though ruling that a simple refusal to pay an insurance claim does not suffice, noting that the tort of infliction of emotional distress against an insurer is actionable in Tennessee); *Chandler v. Prudential Ins. Co.*, 715 S.W.2d 615, 622 (Tenn. Ct. App. 1986) (stating that insurers may be sued for "outrageous conduct"); *Lyons v. Farmers Ins. Exchange*, 26 S.W.3d 888, 893 (Tenn. Ct. App. 2000) (stating that a claim against an insurer for infliction of emotional distress exists where the conduct alleged "is so outrageous that it is not tolerated by a civilized society"); *Graham v. Liberty Mutual Ins. Co.*, No. 08-299, 2009 WL 1034942, at *3 (E.D. Tenn. Apr. 17, 2009) (stating that allegations of bad faith and outrageous conduct can support a claim for infliction of emotional distress against insurer); *Rice v. Van Wagoner Cos.*, 738 F. Supp. 252,

253 (M.D. Tenn. 1990) (holding that extreme and outrageous conduct are sufficient to support claim for infliction of emotional distress against insurer).

The Stuttes' infliction of emotional distress claims, as well as their TCPA and statutory bad faith claims, are not premised on ANPAC's mere refusal to pay their insurance claim. Rather, those claims are based on ANPAC's shoddy and one-sided claims investigation, the outcome of which led to ANPAC publicly accusing the Stuttes of arson and insurance fraud. *See* ANPAC'S Memo in Support of Mot. for Partial Summ. J. (Dkt. No. 28) ("In its Complaint, ANPAC asserted the defense o[f] arson as well as the intentional act exclusion and the concealment of fraud provision contained in the policy.").

None of the four cases cited by ANPAC stands for the proposition that Tennessee courts do not recognize common law tort claims for negligent or intentional infliction of emotional distress against an insurer. The first two cases address an entirely different issue – whether extra-contractual damages may be a component of the relief requested for *other* claims, such as those for breach of contract and statutory bad faith. *See Crocker v. Aero Mayflower Transit Co. Inc.*, 1992 WL 232149, at *2 (Tenn. Ct. App. Sept. 22, 1992) (no punitive damages for breach of contract claim); *Mid-South Milling Co., Inc. v. Loret Farms, Inc.*, 521 S.W.2d 586, 588-89 (Tenn. 1975) (no extra-contractual damages for breach of warranty claim).

The third case cited by ANPAC states the undisputed rule that, due to the available remedy of statutory bad faith, there is no common law tort for bad faith of an insurer in Tennessee. *See Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, F. Supp. 2d 970, 972 (M.D. Tenn. 2008). This rule, though, is irrelevant to whether the Stuttes' separate emotional distress claims can proceed. The final case cited by ANPAC also relates to the exclusivity of the statutory bad faith penalty when asserting a claim for an insurer's bad faith

handling of a claim. *See Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 260 (6th Cir. 1994) (insured could not maintain claim against insurer under TCPA where allegations all consisted of bad faith failure to process claim, which was exclusively actionable under bad faith statute). In addition to its irrelevance to the question of whether the Stuttes' emotional distress claims are actionable, the *Persian Galleries* case has been superseded by subsequent Tennessee Supreme Court decisions. *See Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925-26 (Tenn. 1998) (holding that the bad faith statute is not the exclusive means of bringing an action for unfair or deceptive acts or practices against an insurance company); *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 822 (Tenn. 2003) (permitting insured to sue insurer for bad faith handling of a claim under both the TCPA and the bad faith statute).

The cases cited by ANPAC are all inapposite to the present situation. The Stuttes are not asking for emotional distress damages as part of their breach of contract or bad faith claims, nor are the Stuttes alleging that their emotional distress simply flowed from ANPAC's refusal to pay their claim. Rather, they seek to hold ANPAC responsible for the serious harm, such as high blood pressure, depression and anxiety, that its faulty claims handling has caused them. The Stuttes' claims for negligent and intentional infliction of emotional distress are separate from their contractual claims, and are clearly recognized against insurers in Tennessee. ANPAC has provided no support for its contrary assertion.

<u>Discovery is Necessary and Appropriate on the New Claims and the Old</u>

ANPAC's response also raises arguments that unintentionally undermine ANPAC's Motion for Partial Summary Judgment. For example, ANPAC asserts that the Stuttes' cellular telephone records do not contradict the opinions of ANPAC's cell phone expert, and ANPAC asserts that the sworn affidavit of Lora Lee Black is "suspect." ANPAC's Resp. at 4 (Dkt. No.

38). These evidentiary and credibility issues raised by ANPAC are clear examples of the genuine factual disputes that exist surrounding the Stuttes' counterclaims. As laid out more fully in the Stuttes' Response and Supplemental Memorandum in Opposition to ANPAC's Motion for Partial Summary Judgment (Dkt. Nos. 30 and 36), the Stuttes' counterclaims involve questions of fact that can be determined only after there has been a full opportunity to conduct discovery into ANPAC's conduct (there has been no discovery to date in this case). The existence of these genuine factual disputes also further shows that ANPAC has failed to demonstrate that the Stuttes' Motion for Leave is futile.

Based on the foregoing reasons, the Stuttes respectfully request that the Court GRANT the Stuttes' Motion for Leave to File a Second Amended Counterclaim.

Dated: March 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2012, a copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COUNTERCLAIM** was filed electronically using the Court's Electronic Filing System. Notice of this filing will be served through the Electronic Filing System to parties or counsel who are Filing Users, and by first-class mail to any party or counsel who is not served through the Electronic Filing System.

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