

EXHIBIT 3

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

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	CIVIL ACTION
)	NO. 3:11-CV-219
CAROL ANN STUTTE, et al.)	
)	
<i>Defendants.</i>)	
)	

**THE STUTTES’ SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
ANPAC’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Local Rule 7.1(d), Defendants and Counter-Plaintiffs, Carol Ann Stutte and Laura Jean Stutte (collectively, the “Stuttes”), by and through counsel, submit this Supplemental Memorandum in Opposition to Plaintiff and Counter-Defendant American National Property and Casualty Company’s (“ANPAC’s”) Motion for Partial Summary Judgment. Local Rule 7.1(d) provides that “a party may file a supplemental brief of no more than 5 pages to call to the Court’s attention developments occurring after a party’s final brief is filed.”

This Memorandum calls to the Court’s attention developments occurring after the Stuttes’ opposition brief was filed. The Stuttes have uncovered evidence that raises serious doubts about whether ANPAC was acting in good faith and with diligence when it investigated and ultimately denied the Stuttes’ insurance claim. For the reasons stated herein, and those set forth in the Stuttes’ prior opposition brief, ANPAC’s summary judgment motion – filed *before* the parties have taken *any* discovery – is premature and should be DENIED.

Background and Procedural History

On September 4, 2010, the Stuttes' home and its contents were destroyed by fire. The property, located at 2715 Highway 360, Vonore, Monroe County, Tennessee, was insured by ANPAC under Special Homeowners Policy No. 41-H-V66-965-7 (the "Policy"). The Stuttes timely noticed a claim under the Policy. ANPAC denied the Stuttes' claim and filed the present action in May 2011. Compl. ¶ 5 (Dkt. No. 1); Rule 56(d) Declaration of Scott J. Levitt ¶ 1 (Nov. 15, 2011) (Dkt. No. 31). ANPAC's denial letter and lawsuit accused the Stuttes of setting fire to their home and committing insurance fraud; however, ANPAC did not set forth *any* facts in support of these grave allegations. Compl. ¶ 6; Levitt Decl. ¶ 1. The Stuttes filed counterclaims for breach of contract, declaratory judgment, violation of the Tennessee Consumer Protection Act ("TCPA"), and bad faith. The Stuttes alleged, among other things, that ANPAC knew the Stuttes could not possibly have set fire to their home because they were physically present in Nashville, Tennessee – approximately 200 miles away – at the time of the fire. *See* Am. Countercl. ¶¶ 12, 36, 42 (Dkt. No. 20).

On October 25, 2011, ANPAC moved for partial summary judgment on the Stuttes' bad faith and TCPA claims. (Dkt. Nos. 27-29.) ANPAC's motion and supporting memorandum relied on two affidavits and fourteen exhibits, all of which fall wholly outside of the pleadings. Levitt Decl. ¶ 6. In these materials, ANPAC made numerous factual allegations that the Stuttes vigorously dispute, and of most of which the Stuttes were previously unaware. *Id.* According to ANPAC, "after the loss, [it] conducted an extensive and thorough investigation of the Stuttes' insurance claim." ANPAC's Mem. 12 (Dkt. No. 28). Notably, ANPAC asserted that "[d]uring its investigation, [it] obtained the Stuttes' cell phone records," Affidavit of Stacey Jennings ¶¶ 48-54 (Oct. 11, 2011) (Dkt. No. 27-1), and that its "analysis [of those records] did not indicate

that the Stuttes were in Nashville, at the time of the fire, as they reported,” ANPAC’s Mem. 14. ANPAC also alleged that it had “hired a private investigator, Gary Noland, to assist ANPAC in investigating the claim, obtaining information and conducting witness interviews.” Jennings Aff. ¶ 11.

On November 15, 2011, the Stuttes filed a Memorandum in Opposition, noting that under Federal Rule of Civil Procedure 56(d) and well-established Sixth Circuit precedent, summary judgment is improper where – as here – *no* discovery has taken place. *See* Stuttes’ Mem. 6-12 (Dkt. No. 30). On November 23, 2011, ANPAC filed a Reply Memorandum, arguing that the Stuttes’ should not be allowed to conduct *any* discovery before ANPAC’s motion is ruled upon. *See* ANPAC’s Reply Mem. 1 (Dkt. No. 33).

New Developments

After ANPAC’s motion was fully briefed, the Stuttes’ ongoing investigation uncovered evidence that raises serious doubts concerning whether ANPAC was acting in good faith and with diligence when it investigated and ultimately denied the Stuttes’ claim. First, the Stuttes have obtained records of over two dozen cell phone calls that Carol and Laura Stutte placed or received around the time of the fire. *See* Ltr. from Scott J. Levitt to N. Mark Kinsman & Russell E. Reviere 1 (Jan. 30, 2012) (attached as Exhibit 1). These records include location data that proves that the Stuttes were physically present in Nashville, Tennessee, on the evening of September 4, 2010, that Carol Stutte traveled from Nashville to Vonore in the early hours of September 5, 2010, and that Laura Stutte was in Nashville until mid-afternoon on September 5, 2010, when they placed or received each of the relevant calls. *See id.*, Tabs A-C. Even though ANPAC had represented in its motion that “[d]uring its investigation, [it] obtained the Stuttes’ cell phone records,” Jennings Aff. ¶ 48, plainly ANPAC’s investigation was deficient in failing

to turn up these records. Incidentally, counsel for the Stuttes provided ANPAC with copies of these phone records on January 30, 2012, and afforded ANPAC an opportunity to acknowledge its coverage obligations and withdraw its lawsuit, *see* Levitt Ltr. at 3. ANPAC did not respond.

Second, the Stuttes have obtained an affidavit from Lora Lee Black – a witness whom Gary Noland interviewed as part of ANPAC’s investigation. *See* Affidavit of Lora Lee Black (Feb. 14, 2012) (attached as Exhibit 2); Affidavit of Gary Noland ¶¶ 25-28 (Sept. 30, 2011) (Dkt. No. 27-2). During the interview, Ms. Black informed Mr. Noland that she was with the Stuttes in Nashville, Tennessee, before, during and after the fire and, therefore, the Stuttes could not have burned down their home. Black Aff. ¶¶ 2, 5-8. Ms. Black also attempted to provide Mr. Noland with time-stamped pictures and documents, including her cell and home phone records, from their trip to Nashville. *Id.* ¶¶ 3-4, 7, 11. And Ms. Black advised Mr. Noland that she had toured the Stuttes’ home on the day of the fire and there was “no furniture missing except for [a few] bookcases.”¹ *Id.* ¶ 8. However, Mr. Noland expressed “little or no interest in hearing [Ms. Black] recount the details of [her] trip with the Stuttes to Nashville Instead, he was sharply focused on getting ‘dirt’ on the Stuttes[.]” *Id.* He “showed barely any interest in th[e] documents” and “never looked at any of the time-stamped pictures of the Nashville trip.” *Id.* ¶¶ 7, 11. It became clear to Ms. Black that “Mr. Noland saw his job as finding evidence to support ANPAC’s apparent theory that the Stuttes lied about going to Nashville and [about] having no involvement in the fire. He ignored and did not want to see any evidence that contradicted that theory.” *Id.* ¶ 13.

¹ In its summary judgment motion, ANPAC alleged (and the Stuttes dispute) that “a large amount of furniture was removed from the Stuttes’ house during the two weeks before the fire,” and that there was no visible sign of furniture in the Stuttes’ house on the day of the fire. Jennings Aff. ¶¶ 28, 32.

Argument

ANPAC's motion for partial summary judgment relies heavily on its investigation of the Stuttes' cell phone records, and on the witness interviews conducted by its private investigator, Mr. Noland, in order to claim that "there can be no genuine dispute of material fact that ANPAC acted in good faith in denying the Stuttes' fire insurance claim and did not otherwise act unfairly or deceptively." ANPAC's Mem. 22. To the contrary, evidence uncovered by the Stuttes indicates that ANPAC conducted its investigation in an incompetent, deceptive, misleading, and unfair manner, and that ANPAC ultimately denied the Stuttes' claim in bad faith. At minimum, the evidence described herein raises genuine issues of material fact and demonstrates why the Stuttes must be given the "full opportunity to conduct discovery" that the law requires. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)).

Conclusion

For the foregoing reasons, and those stated in ANPAC's prior opposition brief, ANPAC's motion for summary judgment is premature and should be DENIED.

Dated: February 15, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2012, a copy of the foregoing **SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ANPAC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** 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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