

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 4:19-cv-10083-KMM

TIMOTHY R. HAMPSON
*Personal Representative of the Estate
of Raymond K. Hampson,*

Plaintiff,

v.

WRIGHT NATIONAL FLOOD
INSURANCE COMPANY,

Defendant.

_____ /

ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Wright National Flood Insurance Company’s (“Defendant”) Motion to Dismiss (“Mot.”) (ECF No. 6). Plaintiff filed a response (“Resp.”) (ECF No. 9) and Defendant replied. (ECF No. 10). The motion is now ripe for review.

I. BACKGROUND¹

This is a breach of contract action arising from Defendant’s alleged failure to compensate Plaintiff Timothy R. Hampson (“Plaintiff”)² for flood-related damages under the terms of Standard Flood Insurance Policy (“SFIP”) No. 09115047766907. Compl. ¶¶ 1–5. Defendant is a Write-Your-Own (“WYO”) Program insurance carrier participating in the National Flood Insurance Program (“NFIP”), pursuant to the National Flood Insurance Act of 1968 (“NFIA”), 42 U.S.C. §

¹ The background facts are taken from the Complaint (“Compl.”) (ECF No. 1) and accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009).

² Plaintiff is the duly appointed personal representative of the Estate of Raymond K. Hampson which was and still is the owner of the insured property. See Compl. ¶ 3.

4001, *et seq.* *Id.* at ¶¶ 1, 4. The NFIP makes SFIPs available to individuals who seek protection. 42 U.S.C. § 4001(c). The WYO program permits private insurance companies to issue SFIPs in their own names. 44 C.F.R. § 62.23(f). “By statute, a WYO carrier acts as a ‘fiscal agent’ and ‘fiduciary’ of the United States.” *Smith-Pierre v. Fidelity Nat'l Indem. Ins. Co.*, No. 11-60298-CIV., 2011 WL 3924178, at *1 (S.D. Fla. Sep. 7, 2011) (citations omitted).

Defendant issued Plaintiff an SFIP to cover Plaintiff’s property located at 75180 Overseas Hwy., Monroe County, Islamorada, Florida 33036. Compl. ¶ 2. The property suffered damage from a hurricane on or around September 10, 2017. *Id.* at ¶ 7. In the Complaint, Plaintiff seeks entry of a judgment against Defendant for breach of contract and attorney’s fees, costs and case expenses incurred in filing and prosecuting this action payable under the Equal Access to Judgment Act (“EAJA”), 28 U.S.C. § 2412. *See id.* at ¶¶ 11–12. Defendant moves to dismiss Plaintiff’s claims for attorney’s fees, costs, and case expenses brought pursuant to the EAJA. *See Mot.*

II. **LEGAL STANDARD**

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This requirement “give[s] the defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). When considering a motion to dismiss, the court takes the plaintiff’s factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

III. **DISCUSSION**

Defendant seeks dismissal of Plaintiff’s claims for attorney’s fees, costs, and case expenses brought pursuant to the EAJA arguing that these expenses are not recoverable in a claim under an

SFIP against a WYO carrier. Plaintiff argues that the purpose of the EAJA is to provide for attorney's fees and expenses under appropriate circumstances.

A party may recover attorney's fees and costs under the EAJA as the prevailing party in a case "brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A), (b). The statute defines "United States" to include "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(d)(2)(C). However, attorney's fees are not recoverable under the EAJA in cases for breach of an SFIP brought against a WYO program insurance carrier participating in the United States Government's NFIP because WYO carriers are not considered "agencies" under the EAJA. *Dwyer v. Fidelity Nat'l Prop. & Cas. Ins. Co.*, 565 F.3d 284, 289 (5th Cir. 2009) ("[S]erving as a fiscal agent and a participant in a heavily regulated federal program did not transform Fidelity into a federal agency under the EAJA."). The EAJA must be applied according to its express terms and attorney's fees against a WYO carrier in a suit for SFIP funds may not be maintained under the EAJA. *Id.* at 289–90.

District Courts in this circuit have uniformly found that a plaintiff is not entitled to attorney's fees and costs under the EAJA. *See e.g., Cosgrove v. Wright Nat'l Flood Ins. Co.*, No. 4:18-cv-10117-KMM, Paperless Order Denying Plaintiff's Request for EAJA Fees (S.D. Fla. June 3, 2019), ECF No. 29 (holding that EAJA fees were not recoverable against a WYO Company because it was not an "agency" under the EAJA); *Island Club Condo., Inc. v. Wright Nat'l Flood Ins. Co.*, 4:18-cv-10303-JLK (S.D. Fla. May 9, 2019), ECF No. 16 (granting motion to dismiss claim for attorney's fees under the EAJA because "serving as 'fiscal agents,' without more, does not convert WYO insurers into official government agencies"); *Chatman v. Wright Nat'l Flood Ins. Co.*, No. 3:17-CV-00125-HES-PDB, 2017 WL 3730558, at *1–2 (M.D. Fla. June 21, 2017)

(granting motion to dismiss claim for attorney's fees pursuant to the EAJA because Wright National Flood Insurance Company, a WYO carrier participating in the NFIP, "is not an agency of the United States as required by the EAJA") (citation omitted); *Perdido Sun Condo. Ass'n v. Nationwide Mut. Ins. Co.*, 2007 WL 2565990, at *4 (N.D. Fla. Aug. 30, 2007).³ Here, Plaintiff brings a claim for breach of an SFIP against Defendant, a WYO carrier participating in the NFIP pursuant to the NFIA. Compl. ¶¶ 1–5. Thus, Plaintiff's claims for attorney's fees, costs, and case expenses pursuant to the EAJA are dismissed.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (ECF No. 6) is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of August, 2019.



K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

³ Plaintiff relies on *Arevalo v. Am. Bankers Ins. Co. of Fla.*, No. 219CV159FTM99UAM, 2019 WL 2476644, at *3 (M.D. Fla. June 13, 2019) to support its arguments that attorney's fees and costs are warranted. Therein, the Middle District of Florida found that "it is not so much whether American Bankers is an 'agency' of the United States under the Act. Rather, it seems to matter more whether the government is the source of the funds or who would pay an award of attorney's fees." *Id.* Therefore, the Middle District of Florida concluded that "it is at least plausible at this point in the litigation that attorney's fees may be paid from federal funds by FEMA." *Id.* However, this Court disagrees and declines to depart from the case law in this circuit and other courts finding that a WYO carrier is not an agency of the United States as required by the EAJA.