2017 WL 7692429 (D.S.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. South Carolina.
Beaufort Division

LOWCOUNTRY BLOCK, LLC, and Lowcountry Paver, LLC, Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANIES, The Cincinnati Insurance Company, and The Cincinnati Insurance Group, Defendants.

No. 9:17-cv-01147-RMG.

May 10, 2017.

ORAL ARGUMENT REQUESTED

Defendants' Combined Motion and Supporting Memorandum to Dismiss

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Defendants respectfully move this Court to dismiss Plaintiff's Complaint, or in the alternative, to bifurcate their contractual and extra-contractual claims.[1] In support of this Motion, Cincinnati states the following:

PREFATORY STATEMENT

This is a first party commercial insurance contract (the "Policy") coverage dispute. According to Plaintiff's Complaint, following a theft of unidentified property on *September 23, 2013*, Plaintiff filed a claim with Cincinnati under the Policy and Cincinnati refused to issue "any payment". *See* ECF Dkt. no. 1-1, Pl. Compl., ¶¶8-12, p. 2. Plaintiff's Complaint concludes that Cincinnati breached the Policy and acted in bad faith. Id. at pp. 2-3 (alleging causes of action for "Breach of Contract" and "Bad Faith").

As detailed below, these causes of action are without merit. First, they are untimely. The Policy required Plaintiff to commence legal action against Cincinnati within three years of the date of loss, which was *September 23, 2013*. *See* id. at ¶8, p. 2; Policy, ECF Dkt. no. 1-2, Form IL01940702, p. 15 of 97. Plaintiff, however, did not file its Complaint until *December 23, 2016*, nor did serve it until *April 8, 2017*. *See* Pl. Compl, ECF Dkt. no. 1-1, p. 1. Thus, Plaintiff's pleading is clearly time barred.

Second, Plaintiff's Causes of Action are deficiently pled. Although Plaintiff entitles its causes of action "Bad Faith" and "Breach of Contract", both fail to allege, among other things, how the contract was breached or how Cincinnati acted in bad faith. Plaintiff's Causes of Action proffer only legal conclusions and the bare bones recitation that Cincinnati has not remitted an unidentified amount of "Policy benefits". Id. at ¶9. As a matter of law, such allegations are not actionable. Lastly, even if Plaintiff's claims are timely and sufficiently pled, which they are not, bifurcation of them is necessary, per Fed. R. Civ. P. 42. Accordingly, for each of these reasons which are detailed below, Cincinnati moves this Court to dismiss Plaintiff's Complaint, or in the alternative, to bifurcate Plaintiff's contractual and extra-contractual causes of action.

APPLICABLE LEGAL STANDARDS

When considering a motion to dismiss, a court must accept as true all well-pled allegations and view the complaint in a light most favorable to the plaintiff. *Brumbaugh v. First Finan. Ins. Co.*, 2015 WL 12817166, at *1 (D.S.C. 2015) (Hon. R. M. Gergel) (internal citation omitted). "However, when a plaintiff's assertions amount to nothing more than a 'formulaic recitation of the elements"' of a cause of action, the Court may deem such allegations conclusory and not entitled to an assumption of veracity." *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 833 (D.S.C. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When undertaking this analysis, "a court may rely on only the complaint's allegations and those documents attached as exhibits or incorporated by reference." *Brumbaugh*, 2015 WL 12817166, at *1 (citing *Simmons v. Montgomery Cnty. Police Offs.*, 762 F.2d 30, 31 (4th Cir. 1985)). In sum, a "'complaint will survive a motion to dismiss if it contains 'enough facts to state a claim … that is plausible on its face."' *Callum*, 137 F.Supp.3d at 833 (quoting *Twombly*, 550 U.S. at 570). Here, even assuming Plaintiff's allegations are true, Plaintiff has failed to file suit within the agreed period or allege facts demonstrating that it is entitled to its sought relief. Accordingly, dismissal is proper.

LEGAL ANALYSIS

I.

Plaintiff's Complaint Must Be Dismissed Because It Is Untimely.

In South Carolina[2], a policy holder must commence a civil action "on any policy of insurance … for or on account of any loss arising under the policy" ***within "three years."*** *See* S.C. Ann. § 15-3-530(8) (Westlaw 2017) (emphasis added); *accord* S.C. Ann. § 15-3-140 (Westlaw 2017). The suit limitations provision in the Policy adheres to this requirement, prescribing a three year period as follows:

***

LEGAL ACTION AGAINST US

No one may bring a legal action against us … unless:
1. There has been full compliance with all of the terms of this … Policy; and

2. The action is brought within 3 years after the date on which the direct physical loss ("loss") or damage occurred.

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See id., ECF Dkt. no. 1-2, Form IL01940702, p. 15 of 97 (emphasis in original).[3]

Contractual suit limitations provisions have long been upheld by courts applying South Carolina law. *See* e.*g., Philadelphia Life Ins. Co. v. Arnold*, 81 S.E. 964, 965 (S.C. 1914) (holding that "parties to a contract may, by stipulation therein, fix a reasonable time within which action thereon must be brought, or claims made"); *Bass v. Standard Accident Ins. Co. of Detroit*, 70 F. 2d 86, 87 (4th Cir. 1934) (applying S.C. law) (holding that "parties to an insurance contract may by its terms reasonably restrict the time within which a right thereby conferred may be exercised" notwithstanding the general statute of limitations otherwise applicable); *Armour & Co. Aktieselskab v. Gjeruldsen*, 15 F. 2d 553, 554 (4th Cir. 1926) (holding that the "validity of the clause limiting the time within which suit may be brought is too well settled to admit of doubt").

Further, this precedent is in accord with general South Carolina contract construction principles, which hold that insurance policies, when unambiguous, are to be interpreted as written. *CAMICO Mutual Insurance Company v. Jackson CPA Firm*, 2016 WL 7403959, at *8 (D.S.C., 2016) (citing *Nationwide Mut. Ins. Co. v. Commercial Bank*, 479 S.E.2d 524, 526 (S.C. 1996)).

For example, the South Carolina Supreme Court has held that when an insurance contract "is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (S.C. 1999). Thus, where each party's duties and obligations are clear, they cannot be enlarged or curtailed by judicial construction. *Id.* Accordingly, this Court "must give clear policy language its plain, ordinary, and popular meaning." *Id.*

Here, with the assistance of its insurance agent, Correll Insurance Group, Inc., Plaintiff procured the Policy at issue. *See supra*; *see also* ECF Dkt. no. 1-2, Form IA5090509, p. 1 of 97. The Policy, as set forth above, contains a clear and unambiguous three year suit limitations period, consistent with South Carolina law. Id. Plaintiff, though, did not file suit within this three year period. Plaintiff's Complaint alleges that the loss at issue—*i.e.,* the theft—occurred on September 23, 2013, yet the pleading's file stamp confirms that it was not filed until December 23, 2016. *See* id., ECF Dkt. 1-1, p. 1-2; *see also* ECF Dkt. no. 1-3, Affidavit of W. Hill (showing that process was not served until April 8, 2017). Therefore, even if this Court accepts Plaintiff's allegations as true, Plaintiff's Complaint confirms that Plaintiff failed to file suit within three years of the date of loss. Accordingly, Plaintiff's suit is untimely, and its Complaint must be dismissed with prejudice.

II.

Plaintiff's Complaint Must Also Be Dismissed Because It Fails to State a Viable Claim In Accordance with Federal Rules 12(b)(6) and 8(a)(2).

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999). To survive a motion to dismiss, the Federal Rules require that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although Rule 8(a) does not require "detailed factual allegations," it requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," in order to "give the defendant fair notice of **what the … claim is *and* the grounds upon which it rests**," *Advanced Pain Therapies, LLC v. Hartford Finan. Servs. Grp.*, 2014 WL 4402800, at *1 (D.S.C. 2014) (Hon. M. G. Lewis) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009), which citied to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)) (emphasis added).

In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face."' *Advanced Pain Therapies,* 2014 WL 4402800, at *1 (quoting *Iqbal*, 556 U.S. at 678). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). A complaint alleging facts that are "'merely consistent with' a defendant's liability … 'stops short of the line between possibility and plausibility of entitlement to relief."' *Id.* (quoting *Twombly*, 550 U.S. at 557). Although a court must accept a plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pled with factual support need only be accepted to the extent "they plausibly give rise to an entitlement to relief." *Id.* (quoting *Iqbal*, 556 U.S. at 679).

The Supreme Court's decision in *Iqbal* and this Court's decision in *Advanced Pain Therapies* are instructive. In *Iqbal*, plaintiff was arrested on criminal charges shortly after the September 11, 2001 terrorist attacks. Iqbal was deemed a person of "high interest" and detained by federal officers under allegedly restrictive conditions. Upon detainment, he filed a complaint alleging that "the policy of holding post- September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by defendants Ashcroft and Mueller, and that such defendants "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 667-670.

On appeal, the Supreme Court held that Mr. Iqbal *had failed* to articulate sufficient allegations to support his claim. Although Mr. Iqbal alleged that defendants "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement, "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate

penological interest", and that Messrs. Ashcroft and Mueller were the "principal architect" and "instrumental", respectively, the Court held that such "bare" allegations were "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 680-81 (citing to *Twombly*, 550 U.S. at 555). Mr. Iqbal's complaint should have "contain[ed] facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as 'of high interest' because of their race, religion, or national origin." *Id.* at 683. Because Mr. Iqbal's pleading failed to contain this necessary factual predicate, the Supreme Court held that the lower court should have dismissed the pleading. *Id.*

In *Advanced Pain Therapies*, this Court ruled likewise. There, plaintiff alleged, among other things, claims for bad faith and breach of contract based upon South Carolina law. *Advanced Pain Therapies*, 2014 WL 4402800 at *2. Relative to its bad faith claim, "Plaintiff generally claims that Plaintiff and Defendant are parties to a mutually binding contract of insurance and that Defendant has in bad faith refused to pay benefits due under the contract." *Id.*; *see also* Advanced Pain Therapies Amended Complaint, attached as Exhibit A. "Under South Carolina law", this Court continued, "the elements of a bad faith refusal to pay insurance benefits cause of action are '(1) the existence of a contract of insurance between the parties; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action; and (4) causing damage to the insured.'" *Advanced Pain Therapies*, 2014 WL 4402800 at *2 (quoting *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F.Supp.2d 453, 457 (D.S.C. 2008) (internal citations omitted)). Here, this Court concluded, "Plaintiff's complaint fails to adequately allege facts establishing the existence of a contract or its essential terms. It contains only bare and conclusory allegations which are insufficient to establish a cause of action for bad faith refusal to pay insurance benefits. Accordingly, this cause of action is dismissed." *Id.*

Similarly, this Court continued, plaintiff's "complaint fails to set forth sufficient facts establishing the existence of a binding contract between Plaintiff and Defendant." *Advanced Pain Therapies*, 2014 WL 4402800 at *2. "To establish a breach of contract, Plaintiff must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach." *Id.* (quoting *Bank v. How Mad, Inc.*, 4:12–cv–3159, 2013 WL 5566038, *3 (D.S.C. Oct. 8, 2013) (internal citations omitted)). Plaintiff's complaint "fails to set forth sufficient facts regarding *how* the contract was breached." *Id.* (emphasis added). "Plaintiff's breach of contract claim is supported by nothing more than legal conclusions which the Court need not accept as true. *Id.* (citing *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.")). Accordingly, this Court dismissed Plaintiff's breach of contract claim as well.

Here, even if Plaintiff's claims are timely, which they are not, they fail to allege the grounds upon which they rest. Relative to its "Bad Faith" Cause of Action, Plaintiff alleges that Cincinnati "acted negligently and in bad faith in failing … to pay" benefits due under the Policy. *See* ECF Dkt. no. 1-1, p. 3, ¶13. The only action which Plaintiff's Complaint identifies in support is the preceding paragraph, wherein Plaintiff alleges that although "Plaintiff spent numerous hours providing information" to Cincinnati, Plaintiff has not received "any payment", but only a "request [from Cincinnati] for additional documentation." Id. at p. 2, ¶12. Even if this were true, which it is not, a mere "request for additional documentation" is not evidence of "bad faith". Conspicuously absent are any allegations showing how the documents and information Plaintiff provided were sufficient to substantiate its Bad Faith claim or how Cincinnati's request for "additional documentation" was unreasonable. *See supra Advanced Pain Therapies*, 2014 WL 4402800 at *2. Accordingly, Plaintiff's Bad Faith Cause of Action fails to state a plausible claim for relief, and it should be dismissed.

This same deficiency pervades Plaintiff's "Breach of Contract" Cause of Action. There, Plaintiff concludes that Cincinnati "failed to comply with the terms of the policy", has "refuse[d] … to pay policy benefits", and that as a result, "Plaintiff has suffered damage". *See* ECF Dkt. no. 1-1, Compl., ¶¶17-18, p. 3. Notably absent are any allegations identifying the property being claimed; the amounts being claimed; the policy provisions that cover Plaintiff's claim; or otherwise how Cincinnati breached the Policy.

In sum, once Plaintiff's legal conclusions are removed, its Complaint fails to contain a "plausible claim of relief; *i.e.*, facts which demonstrate how Cincinnati purportedly breached the Policy and acted in bad faith. Because Plaintiff's Causes of Action fail

to contain this necessary factual predicate, Cincinnati respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice.

III.

In The Alternative, This Court Should Bifurcate Plaintiff's Bad Faith Claim And Stay Its Litigation Until Coverage Is Adjudicated.

Under Federal Rule of Civil Procedure 42(b), trials courts have "broad discretion and inherent power" to bifurcate, for discovery and/or trial, issues, claims, and other matters. *Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 635 (D.C. Cir. 2010). The decision to bifurcate is discretionary and contingent upon whether it may prejudice the parties, confuse the jurors, or adversely impact judicial economy. *Wilson v. Morgan,* 477 F.3d 326, 339 (6th Cir. 2007) (internal citation omitted). The most frequently encountered situation when bifurcation is appropriate is when the "evidence offered on two different issues will be wholly distinct, or where litigation of one issue may obviate the need to try another issue." *Athridge*, 604 F.3d at 635 (internal citation omitted). Ultimately, the "question of bifurcation centers on whether resolution of a single claim would be dispositive for the entire case." *Woody's Rest., LLC v. Travelers Cas. Ins. Co. of Am.*, 2014 WL 108317, at *2 (E.D. Ky. 2014) (quoting *Brantley v. Safeco Ins. Co. of Am.*, 2011 WL 6012554, at *1 (W.D. Ky. 2011)) (internal citations omitted).

Cases with contractual and extra-contractual coverage claims lend themselves to bifurcation, in both discovery and trial, because if the plaintiff cannot prevail on the coverage issue, the claim for bad faith necessarily fails. Indeed, numerous Federal Circuit and District Courts that have encountered this situation have held that bifurcation of a "bad faith" claim is proper, if it hinges upon the insured first establishing a breach of contract. *See e.g. Smith v. Allstate Ins. Co.*, 403 F.3d 401, 407 (6th Cir. 2005) (affirming the district court's decision to bifurcate the coverage and bad faith claims, and to stay discovery on the bad faith claim pending disposition of the coverage claim, as the bad faith claim depended, in large part, upon whether the policy at issue provided coverage.); *O'Malley v. U.S. Fidelity and Guar. Co.,* 776 F.2d 494, 500-01 (5th Cir. 1985) (upholding a district court's bifurcation order when "recovery on the bad faith claim would not have been possible unless [the insured] prevailed on his coverage claim."); *Farmers Bank v. BancInsure, Inc.,* 2011 WL 2023301, at *1 (W.D. Tenn. May 20, 2011) (holding same); *Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 635 (D.D.C. 2010) (holding same); *Cook v. United Services Auto. Ass'n.,* 169 F.R.D. 359, 361 (D. Nev. 1996) (Gfanting an insurer's motion to bifurcate and stay the litigation of plaintiff's bad faith claims, as the insurer's success on the coverage claim would preclude the insured's bad faith action.); *Aetna Cas. & Sur. Co. v. Nationwide Mut. Ins. Co.*, 734 F. Supp. 204, 208 (W.D. Pa. 1989) (granting Nationwide's motion to bifurcate plaintiff's breach of contract and bad faith claims); *accord Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000) (holding that "absent a contractual obligation, there simply is no bad faith cause of action, either at common law or by statute."); *Taylor v. Maryland*, No. CIV.A. DKC 10-2167, 2010 WL 5247903, at *1-*2 (D. Md. Dec. 16, 2010) (granting bifurcation and stay of discovery when the viability of one of the plaintiff's claims was dependent upon the resolution of another and noting, among others, that while a jury instruction could limit the harm to the defendant from prejudicial evidence in a single trial, "no instruction is likely to remove entirely the potential for prejudice"); *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440, 1444 (4th Cir. 1993) (finding that introduction of highly prejudicial evidence relevant only to some of the plaintiffs' claims but irrelevant to another claims denied the defendant a fair trial).

Here, in South Carolina, if an insured does not prevail on its breach of contract claim, such that "there is a reasonable ground for contesting a claim, there is no bad faith." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992) (citing *Nichols v. State Farm Mutual Automobile Insurance Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983)). This standard meets the seminal requirement of Rule 42, such that bifurcation is proper when resolution of one claim, the breach of contract claim, would be dispositive of the entire case. *See supra.*

Additionally, bifurcation in this case would not prejudice the Parties, confuse the jurors, or adversely impact judicial economy. Plaintiff's claims of breach of contract and common law bad faith, as set forth in Section II *supra*, require different evidence. Whereas the breach of contract claim hinges upon a legal interpretation of the Policy, the bad faith claim requires an assessment

of the reasonableness of Cincinnati's adjustment activities. Clearly, these are separate issues. Further, whereas Plaintiff's breach of contract claim necessitates limited discovery and is a claim which this Court could likely readily resolve, Plaintiff's bad faith claim is likely to entail protracted discovery and possibly, factual adjudication.

Moreover, *not* bifurcating Plaintiff's Causes of Action would create prejudice, as opposed to avoid it. Discovering and trying Plaintiff's Causes of Action together would crate prejudice, as the jury would have to discern the elements of each cause of action, while understanding and separating the evidence attributable to each; a significant task which is likely to prejudice Cincinnati. Conversely, bifurcating the Causes of Action would avoid this prejudice, expedite judicial resolution for the reasons set forth above, potentially avoid unnecessary Court and Party-expenses, and permit the Court to focus on a single issue at a time. In sum, bifurcation of Plaintiff's Breach of Contract and Bad Faith Causes of Action are warranted, given the facts, the aforementioned case law, and the potential, complete abrogation of Plaintiff's bad faith claim. Accordingly, should this Court determine that Plaintiff's Causes of Action are timely and sufficiently pled, which they are not, bifurcation during discovery and trial is necessary.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant, The Cincinnati Insurance Company, respectfully moves this Honorable Court to dismiss Plaintiff's Complaint, or in the alternative, to bifurcate during discovery and trial, Plaintiff's Breach of Contract and Bad Faith Causes of Action.

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Footnotes

1 Although the Complaint lists Lowcountry Block, LLC ("Low Country Block" or "Plaintiff") and Lowcountry Paver, LLC as Plaintiffs and The Cincinnati Insurance Companies, The Cincinnati Insurance Company ("Cincinnati Insurance Company" or "Cincinnati"), and The Cincinnati Insurance Group as Defendants, Low Country Block and Cincinnati are the ***only*** parties with an interest in the insurance policy at issue; and thus, are the only real parties in interest. *See* ECF Dkt. no. 1-2, Policy, Form IA5090509; Fed. R. Civ. P. 17.

2 Since this matter is a diversity action arising in South Carolina, the law of the forum state of South Carolina controls. *Brumbaugh*, 2015 WL 12817166, at *1 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) and *Limbach Co., LLC v. Zurich Am. Ins. Co.*, 396 F.3d 358, 361 (4th Cir. 2005)).

3 Cincinnati reserves its argument as to whether Plaintiff has complied with all of the terms of the Policy.

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