2021 WL 4815208
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

SHEA PROPERTIES MANAGEMENT COMPANY, INC. et al
v.
The CONTINENTAL INSURANCE COMPANY, et al

Case No. SA CV 21-00514-DOC-(JDEx)
|
Filed 06/29/2021

Attorneys and Law Firms

Gregory Lee Dillion, Chanmaly Kendie Schlecht, Eric J. Rollins, Newmeyer and Dillion LLP, Newport Beach, CA, for Shea Properties Management Company, Inc. et al.

Lawrence Hecimovich, Jonathan R. Gross, Mound Cotton Wollan and Greengrass, LLP, Emeryville, CA, for The Continental Insurance Company, et al.

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [8]

DAVID O. CARTER, JUDGE

***1** Before the Court is a Motion to Dismiss (Dkt. 73) ("Motion" or "Mot.") brought by Defendant, The Continental Insurance Company ("Defendant" or "Continental"). The Court finds the matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 715. Having reviewed the moving papers submitted by the parties, the Court **GRANTS** the Defendant's Motion.

I. Background

A. Facts

Continental issued insurance policy number C 6072406876 (the "Policy") to Pacific Construction Group ("PCG"), providing certain builders risk coverage for the jobsite located at 666 E Dyer Road, Santa Ana, California 92705 (the "Project"), effective from September 23, 2019 to April 15, 2020. Defendant's Request for Judicial Notice (Dkt. 9) ("RJN") at 2. Plaintiffs Shea Properties Management Company, Inc. ("Shea Management") and Dyer Business Park, LLC ("Dyer Business Park") (collectively, "Shea" or "Plaintiffs") own the Project and entered into a contract with PCG to construct the Project. Complaint ("Compl.") ¶ 20. Pursuant to the Policy's Additional Named Insureds endorsement, all owners, such as Plaintiffs, are added to the Policy as additional named insureds. Mot. at 2.

On December 14, 2018, PCG submitted an insurance claim to Continental for "damages caused as a result of continuous rainfall at the Project." Compl. ¶ 23. According to the Complaint:

> Between November 2018 and March 2019, multiple weeks of sustained rains occurred at the Project, which oversaturated the soil and caused significant construction delays and damages to the Project. Continuous water saturation of the soil also added costs to address the wet soil and achieve sufficient dryness for construction to continue. Each rain event during this time period added costs to properly remediate and dry the affected soil.
>
> * * *
>
> ... the Project suffered significant construction delays and damages due to multiple weeks of sustained rains across many months that over-saturated the soil. Continental was also notified that throughout the periods of sustained rainfall, construction was periodically stopped or delayed in order to allow the wet soil to stabilize and dry, only to experience additional rain that varied in length and severity through March 2019.

On March 26, 2019, Continental disclaimed coverage for this damage, noting the Policy's flood exclusion, which bars coverage for loss caused by the "partial or complete inundation of normally dry land areas." Compl. ¶ 24.

B. Procedural History

On March 18, 2021, Plaintiffs filed their Complaint against Defendant, alleging breach of written contract and breach of the implied covenant of good faith and fair dealing. Compl. ¶ 1. On March 25, 2021, Defendant filed the instant Motion to Dismiss these claims and Memorandum of Law in Support of Motion to Dismiss. Mot. at 1. Plaintiffs filed the Opposition (Dkt. 13) ("Opp'n.") on April 5, 2021. On April 12, 2021, Defendant filed the Reply (Dkt. 17) ("Reply") in support of its Motion to Dismiss.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See* *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

***2** In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by* *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.,* *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.,* *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

In the instant Motion, Defendant argues that this Court should dismiss Plaintiffs' claims since the damage that Plaintiffs experienced from sustained rains falls within the Policy's flood exclusion, and the Policy does not cover land. Mot. at 2. Defendant also contends that Plaintiffs are unable to state a claim for breach of the implied covenant of good faith and fair dealing. *Id.* The Court addresses these arguments in turn.

A. Breach of Written Contract

Defendant was correct to deny Plaintiffs coverage since the construction delays and Project damages that Plaintiffs experienced fell squarely within the Policy's flood exclusion. Mot. at 8. Under California law, interpretation of an insurance policy is a question of law that is decided under the rules of contract interpretation. *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19, 27 (2006); *U.S. TelePacific Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 2590171, at *2 (C.D. Cal. June 18, 2019), *aff'd*, 815 F. App'x 155 (9th Cir. 2020). Like other forms of contractual interpretation, the language of a policy is interpreted in context, and courts must read the policy "as a whole with each part being read in conjunction with other portions thereof." *Hartford Accident & Indem. Co. v. Sequoia Ins. Co.*, 211 Cal.App.3d 1285, 1298 (1989); *ML Direct, Inc. v. TIG Specialty Ins. Co.*, 79 Cal.App.4th 137, 141 (2000). An insurance policy should be enforced as written when its terms are clear. *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). Moreover, an insurer "has the right to limit the coverage of a policy issued by it and when it had done so, the plain language of the limitation must be respected." *Cont'l Cas. Co. v. Phoenix Const. Co.*, 46 Cal.2d 423, 432 (1956); *see also Crusader Ins. Co. v. Burlington Ins. Co.*, 2020 WL 4919387, at *6 (C.D. Cal. June 12, 2020). Accordingly, without a clear indication to the contrary, the ' "clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' controls judicial interpretation." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 666 (1995).

***3** The Policy's flood exclusion clearly states that any "loss or damage caused directly or indirectly" by flood will not

be covered and defines "flood" as including "the unusual and rapid accumulation or runoff of surface waters." Mot. at 5-6. California courts have consistently held that the phrase "surface water" may be interpreted to include rainwater that accumulates on land, just like the sustained rains that Plaintiffs experienced. *LeBrun v. Richards*, 210 Cal. 308, 315 (1930) ("Surface waters are those which are produced by rainfall, melting snow, or springs, and which in the case of the two first-mentioned sources are precipitated, and in the case of the last-mentioned source, rise upon the land"); *Mogle v. Moore*, 16 Cal.2d 1, 8 (1940) ("Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them."); *Morris v. Allstate Ins. Co.*, 16. F.Supp.3d 1095, 1102-1103 (C.D. Cal. 2014) ("California courts have defined 'surface water' to include water derived from rain."). Plaintiffs argue that these cases are inapposite since the insurance claims analyzed in those cases do not specifically involve flood exclusion provisions. Opp'n. at 16-17. However, this argument is unpersuasive since Plaintiffs offer no substantial justification for why this Court cannot rely on other interpretations of "surface water" to evaluate the Policy. *See* *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008, 1022 (2009) (relying on cases not involving insurance claims to define the terms "watercourse" and "surface water" as those terms were used in policy at issue).

Plaintiffs cite non-binding precedent and broad principles of policy interpretation to argue that the phrasing of "unusual and rapid accumulation...of surface water" in the flood exclusion provision does not exclude their damages caused by a merely routine accumulation of surface water. Opp'n. at 18-22 (emphasis added). Plaintiffs focus on the other sections of the flood exclusion provision regarding tidal waves and dam breaks to assert that "unusual and rapid accumulation...of surface water" should be read restrictively to align with only such extreme events. In support of their argument, Plaintiffs cite that "courts will adopt a restrictive meaning of a listed item if acceptance of a broader meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." *Blue Shield of Calif. Life & Health Ins. Co. v. Superior Court*, 192 Cal. App. 4th 727, 740 (2011). While Plaintiffs are correct in stating this principle of policy interpretation, they fail to acknowledge the next line in *Blue Shield* clarifying that "th[is] doctrine is not applicable to terms that are set apart in different clauses for apparent disparate treatment." *Id.* Here, the Policy clearly sets apart "the unusual and rapid accumulation or runoff of surface waters from any source" from the provisions involving tidal waters and dam breaks. Ex. A to Hecimovich Decl. (Dkt. 8-2) at 35, 44, 46; Compl. ¶ 18. Therefore, the doctrine Plaintiffs cite from *Blue Shield* does not prove their argument here.

Plaintiffs also invoke the principle of *ejusdem generis* to argue that "unusual and rapid accumulation...of surface waters" must be similar to a tsunami or dam break since all these terms are in the same list. Opp'n. at 20-22. However, the policy has already made clear that the unifying thread between these categories is that they all involve "a general and temporary condition of partial or complete inundation of normally dry land." Ex. A to Hecimovich Decl. (Dkt. 8-2) at 35, 44, 46. The sustained rains Plaintiffs experienced over several weeks certainly created such a partial or complete inundation of land; therefore, the flood exclusion provision appropriately excludes the damages incurred here. Additionally, Plaintiffs correctly note that ambiguous terms in an insurance policy should be interpreted in Plaintiffs' favor, but such an argument is meritless here since the phrase "surface water" is not ambiguous. Opp'n. at 22-25. Courts have consistently recognized that "surface water" may include accumulated rainwater, and a common method of contract interpretation involves evaluating terms in their "ordinary and popular sense." *Montrose Chem. Corp.*, 10 Cal.4th at 666.

Finally, Plaintiffs contend that, since the flood provision does not exclude their losses, their damages are considered Site Preparation Expenses, and their land is considered Covered Property under the Policy. Opp'n. at 14-16. Since the Court has found in favor of Defendant regarding Plaintiffs' flood exclusion argument, it need not consider the merits of Plaintiffs' Site Preparation Expense argument. Accordingly, the Court GRANTS the Defendant's Motion under Rule 12(b)(6) to Dismiss the claims regarding breach of written contract and DENIES any declaratory relief.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

***4** Plaintiffs are also unsuccessful in their claim alleging that Defendant is liable for breach of the implied covenant of good faith and fair dealing. Compl. ¶¶ 44-52; Mot. at 2. Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1393 (1990). The "implied covenant

imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." *Id.* In the context of insurance policies, a claim for breach of the implied covenant of good faith requires: (1) benefits due under the policy must have been withheld and (2) the reason for withholding the benefits must have been unreasonable or without proper cause. *Love v. Fire Ins. Exchange*, 221 Cal.App.3d 1136, 1151 (1990).

Defendant could not have breached its implied covenant of good faith and fair dealing since its reason for withholding benefits from insurance coverage was not unreasonable or improper. As discussed, Defendant recognized that Plaintiffs' damage incurred from "sustained rains" that "over-saturated the soil" over the course of several weeks fell within the Policy's flood exclusion and withheld benefits accordingly. Plaintiffs also contend that Defendant demonstrated acts of bad faith by "failing to promptly and reasonably investigate and provide payment for claims made by Plaintiffs," however, the evidence provided does not suggest that Defendant failed to conduct a reasonable and thorough investigation. Compl. ¶ 46. Defendant conducted its initial investigation of the property on December 27, 2018 and denied coverage. *Id.* ¶¶ 24-25. After receiving Plaintiffs' supplemental claim and evidence, Defendant then proceeded to re-investigate Plaintiffs' damages and construction delays from July 2019 to March 2020 over the course of several visits with multiple adjusters. *Id.* ¶¶ 26-30. These were good faith efforts made by Defendant to address, rather than ignore Plaintiffs' supplemental claims. *See* Opp'n. at 15.

In these circumstances, the Court also finds that amendment would be futile since the insurance policy, taken together with binding case law, does not leave any of the language as ambiguous. Additionally, amendment would be futile since the complaint has already unconvincingly alleged several specific acts of alleged bad faith. The dismissal shall therefore be with prejudice.

Accordingly, the Court GRANTS the Defendant's Motion under Rule 12(b)(6) to Dismiss the claim regarding breach of the implied covenant of good faith and fair dealing.

IV. Disposition

For the reasons explained above, the Court GRANTS Defendant's Motion to Dismiss. Defendant is hereby DISMISSED WITH PREJUDICE.

All Citations

Slip Copy, 2021 WL 4815208

End of Document