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12-0993

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

**JOHN D. LONGANACRE
D/B/A/ LONGANACRE FUNERAL HOME,
Plaintiff,**

v.

Civil Action No. 12-C-98

**FARMERS MUTUAL INSURANCE COMPANY,
a West Virginia corporation,
Defendant.**

ORDER

This matter is before the Court pursuant to the Defendant's Motion to Dismiss filed on June 7, 2012. The Plaintiff filed a Response to the Defendant's Motion to Dismiss on June 21, 2012. A hearing was held before the Court on June 25, 2012.

For the reasons stated below, the Court finds that the Defendant's Motion to Dismiss should be granted.

Facts and Procedural History

On June 22, 2010, Becky A. Ormold and Richard W. Alderson [hereinafter referred to as "Ormold Plaintiffs"] filed a Complaint [hereinafter referred to as "Ormold Complaint"] in the Circuit Court of Greenbrier County, West Virginia, against several defendants, including the Plaintiff herein, Longanacre Funeral Home, [hereinafter referred to as "Longanacre"]. Longanacre is a licensed West Virginia Funeral Home in Ronceverte, West Virginia.

The Ormold Plaintiffs are the children and legal beneficiaries of Marlene Walkup Anderson. Marlene Walkup Anderson was married to Melvin Anderson who died intestate on November 17, 1989. Melvin Anderson was originally buried in a plot at Greenbrier Memorial Gardens [hereinafter referred to as "GMG"]. In 2007 Marlene Walkup Anderson applied to disinter Melvin Anderson's body. On December 15, 2007 the Lobban Funeral Home was granted a permit to disinter and reinter his body at the Bennett Family Cemetery in Blue Sulphur

Bruce

Springs, West Virginia. Marlene Walkup Anderson died on January 9, 2008. On February 8, 2008, Melvin Anderson was disinterred and reinterred at the Bennett Family Cemetery next to Marlene Walkup Anderson at the Bennett Family Cemetery.

On October 6, 2009, Betty F. Anderson, Melvin Anderson's sister, applied for a Disinterment-Reinterment Permit requesting that Longanacre be granted a permit to disinter and reinter Melvin Anderson's body from the Bennett Family Cemetery to GMG. Longanacre and Betty F. Anderson obtained a Court order and all of the necessary State permits prior to moving Melvin Anderson's body. Betty F. Anderson had Melvin Anderson disinterred from the Bennett Family Cemetery and reinterred at the GMG in a vault purchased by Marlene Walkup Anderson.

The Orndol Complaint against Longanacre alleges the following: 1) that Longanacre failed to inform the Orndol Plaintiffs of the second move of Melvin Anderson's body; 2) that Longanacre wrongfully exerted dominion over the property of the Orndol Plaintiffs when Melvin Anderson was interred in the crypt at GMG; 3) that Longanacre wrongfully converted the property of the Orndol Plaintiffs by removing the military marker or headstone from Melvin Anderson's grave at the Bennett Family Cemetery; 4) that Longanacre negligently disturbed the grave of Marlene Walkup Anderson during the disinterment of Melvin Anderson.

On August 9, 2010, Betty F. Anderson filed a Motion to Dismiss, Answer, Assignment of Defenses, and Counter-Claim. On August 24, 2010, the Orndol Plaintiffs filed a Motion to Dismiss Defendant Betty F. Anderson's Counter-Claim. On November 23, 2010 the Orndol Plaintiffs filed their Response to Defendant, Betty F. Anderson's Motion to Dismiss and Memorandum of Law. A hearing on the Motion to Dismiss was held on February 22, 2011 and by Order dated March 21, 2011 the Court denied the Defendant's Motion to Dismiss because the

Ornold Plaintiffs accused the Defendants of negligently mishandling the grave of Marlene Walkup Anderson and therefore might be entitled to relief. A Scheduling Order was entered on May 4, 2011 and the parties subsequently began the discovery process.

By letter dated July 20, 2011, Barry L. Bruce, counsel for Longanacre, wrote to the Defendant, Farmers Mutual Insurance Company [hereinafter referred to as "Farmers"] and provided it with a copy of the Ornold Complaint, Answer and Scheduling Order. On August 10, 2011, Farmers wrote to John D. Longanacre denying coverage and informing him that there was no duty on the part of Farmers to indemnify or defend. Farmers cited to three provisions of the insurance contract which operated to preclude coverage. First, that the allegations against Longanacre contained in the Ornold Complaint did not meet the definition of an occurrence as set forth in the Farmers policy. Second, that the allegations in the Ornold Complaint asserted conversion as well as wrongful/intentional acts by Longanacre and were therefore specifically excluded under the policy. Third, that Longanacre did not comply with the express policy provisions in that it failed to promptly notify Farmers of a claim and failed to promptly send copies of legal papers, demands and notices to Farmers.

On April 17, 2012, the Circuit Court of Greenbrier County entered an Order granting summary judgment to Longanacre and dismissing Longanacre from the case. On June 25, 2012, the Plaintiff herein moved to dismiss the Defendants, Hanshaw Insurance Agency, Inc. and Debra K. Viers, Agent, with prejudice. The Court granted the motion by Order dated June 25, 2012.

Defendant's Motion to Dismiss

The Defendant, Farmers, argues that Longanacre's over one year delay in notifying Farmers of the Orndol Complaint precludes coverage under the contract and therefore the Complaint against Farmers should be dismissed. The Defendant also argues that the intentional acts of Longanacre were the efficient proximate cause of the injury alleged in the Orndol Complaint and therefore, the allegations do not meet the definition of an occurrence under the applicable policy.

Plaintiff's Response to Motion to Dismiss

The Plaintiff argues that the delay in giving notice to Farmers is not on its face unreasonable although the lawsuit was filed on June 22, 2010 because of the Motion to Dismiss filed by Defendant Betty F. Anderson. The Plaintiff argues that nothing occurred in the case until after the Court denied the Motion to Dismiss on March 23, 2011. Furthermore, that the Plaintiff had an understanding with the Defendants Greenbrier Valley Memorial Vault Company and Betty F. Anderson that Ms. Anderson would file a motion to dismiss the Orndol Complaint because she felt responsible for involving Longanacre and Baker in the suit. The Plaintiff argues that Mr. Longanacre was advised by Counsel to wait until the Court ruled on the Motion to Dismiss before informing Farmers.

The Plaintiff also argues that the efficient proximate cause of the injury in the Orndol Complaint was the alleged negligence by Longanacre in negligently disturbing the grave of Marlene Walkup Anderson. The Plaintiff argues that the Court determined the negligence action was the predominant cause of the loss in the Orndol Complaint and therefore, the Defendant had an obligation to defend Longanacre.

Motion to Dismiss Standard

Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* provides that a court may dismiss a plaintiff's cause of action for "failure to state a claim upon which relief can be granted." In considering a defendant's 12(b)(6) motion to dismiss, the court must view "the complaint . . . in the light most favorable to [the] plaintiff, and its allegations are to be taken as true. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157, 158 (1978). Further, "[t]he trial court's inquiry will be directed to whether the allegations constitute a statement of a claim under Rule 8(a)." *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207, 212 (1977).

Further, the Supreme Court has found that the standard which the plaintiff must meet to overcome a motion under subdivision (b)(6) is a liberal standard, and few complaints fail to meet it. The Plaintiff's burden in resisting a motion to dismiss is a relatively light one. *Lodge*. Additionally, the *Chapman* Court found that the trial court, in appraising the sufficiency of a complaint on a motion under subdivision (b)(6), should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Analysis

The first issue before the Court is whether the Plaintiff's one year delay in notifying the Defendant of the Orndorff Complaint precludes coverage under the contract because the length of delay was unreasonable. The West Virginia Supreme Court of Appeals has held that "the question of whether an insurance company was notified within a reasonable time period is, generally, a question of fact for the finder of fact." *Colonial Insurance Company v. Floyd*

Barrett, 208 W.Va. 712, 542 S.E.2d 869 (2000). Therefore, the Court will not address the reasonableness of the one year delay in notifying the Defendant of the Complaint; however the Court notes that the insurance policy states that if a claim is made or suit is brought, the insured must *promptly* send to “us” copies of all legal papers, demands and notices.

The next issue before the Court is whether the allegations in the Orndol Complaint meet the definition of occurrence. The insurance policy issued to the Plaintiff by the Defendant provides certain liability and property damage coverage caused by an occurrence that occurs during the policy period. The relevant language is as follows:

PRINCIPAL COVERAGE

“We” will pay those sums which the “insured” becomes legally obligated to pay as “damages” due to bodily injury or property damage, including mental anguish, to which this insurance applies. The “bodily injury”, “property damage”, or mental anguish must be caused by an “occurrence” which takes place in the “coverage territory”, and the “bodily injury”, “property damage”, or mental anguish must occur during the policy period.

Occurrence is defined by the policy as follows:

SECTION V DEFINITIONS

13. Occurrence means an accident, and includes repeated exposure to similar conditions.

The West Virginia Supreme Court of Appeals has examined a similar definition of occurrence. *American Modern Home Insurance Company v. Corra*, 222 W.Va. 797, 671 S.E.2d 802 (2008). The West Virginia Supreme Court of Appeals stated that the word “accident” is defined as “an event occurring by chance or arising from unknown causes.” *Id.* at 801, 806. The Court went on to state that where a homeowner engages in conduct knowingly, that conduct clearly cannot be said to be unexpected and unforeseen from the

perspective of the homeowner. Furthermore, that conduct engaged in knowingly is not an “accident” and thus not an “occurrence”. *Id.*

The Orndol Complaint includes several allegations against Longanacre. First, that the caretakers of the Bennett Family Cemetery were never informed by Longanacre of the disinterment as required by the Disinterment-Interment Application and permit to the Department of Health and Human Services. Second, that Longanacre wrongfully exerted dominion over the property of the Orndol Plaintiffs when Melvin Anderson was interred in the crypt at GMG, which they owned, without their consent. Third, that Longanacre negligently disturbed the grave of Marlene Walkup Anderson during the disinterment of Melvin Anderson. Fourth, that Longanacre wrongfully exerted dominion over the headstone of Melvin Anderson purchased by Marlene Anderson when it was removed from the Bennett Family Cemetery to GMG. Fifth, that the Orndol Plaintiffs suffered mental anguish and distress due to the disturbance of Marlene Walkup Anderson’s grave and the undisclosed disinterment and reinterment of their stepfather by Longanacre. Finally, that the Orndol Plaintiffs suffered damages as a direct result of conversion of their property by Longanacre.

On April 24, 2012 the Court entered an Order Granting the Motions for Summary Judgment filed on behalf of the Defendants Longanacre and Greenbrier Valley Memorial Vault Company, Inc. The Order addressed each of the claims in the Orndol Complaint. The Court found that Longanacre had no duty to inform the Orndol Plaintiffs of the disinterment of the Melvin Anderson. The Court found that Longanacre did not wrongfully exert dominion over or convert the property of the Orndol Plaintiffs when Melvin Anderson’s military marker was removed. The Court found no evidence that Longanacre negligently disturbed the grave

of Marlene Walkup Anderson. The Court found that Longanacre did not wrongfully exert dominion over the headstone of Melvin Anderson. The Court ruled on the merits of the case and dismissed Longanacre from the case.

With the exception of the negligence claim all of the claims against Longanacre concerned intentional and knowing acts and therefore the Court finds that these do not constitute occurrences under the policy. The Plaintiff argues that the Court previously determined in its March 21, 2011 Order that the alleged negligent mishandling of the grave of Marlene Anderson was the predominate cause of any loss by the Orndol Plaintiffs. The Court disagrees with the Plaintiff's argument. The March 21, 2011 Order simply states that under *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985) a cause of action exists for negligently or intentionally mishandling or losing a dead body, even when its disinterment and reinterment are authorized and therefore the Orndol Plaintiffs *may* be entitled to relief. Later, the Court found no evidence of negligence. In any event Longanacre cannot use the claims arising in negligence to prevent the operation of "occurrence" language in the policy.

Ruling

For the reasons stated above the Motion to Dismiss is **GRANTED** for the Defendant.

The Clerk is **ORDERED** to forward a copy of this Order to the parties and their Counsel at their respective addresses of record.

Entered this 26th day of July, 2012.

A True Copy:
ATTEST:

Louronne A. Bruckle
Clerk, Circuit Court
Greenbrier County, WV

James J. Rowe
James J. Rowe, Judge
Eleventh Judicial Circuit