

12-0203

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

JOHNNIE FLUKER, JR.,

Plaintiff,

v.

Civil Action No. 09-C-110
(Honorable David R. Janes)

DAN CAVA, STEVEN HALL, SONNY NICHOLSON,
AND DAN'S CAR WORLD, LLC, D/B/A
DAN CAVA'S TOYOTA WORLD,

Defendants,

DAN CAVA, STEVEN HALL, AND
DAN'S CAR WORLD, LLC, D/B/A
DAN CAVA'S TOYOTA WORLD,

Third Party Plaintiffs,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.,

Third Party Defendant.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.,

Counter-Plaintiff,

v.

DAN CAVA, STEVEN HALL, DAN'S CAR WORLD, LLC,
D/B/A DAN CAVA'S TOYOTA WORLD,
SONNY NICHOLSON, AND JOHNNIE FLUKER, JR.

Counter-Defendants.

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**ORDER, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW GRANTING
THIRD-PARTY DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.'S MOTION FOR SUMMARY JUDGMENT**

On the 21st day of November, 2011, this matter came before the Court for a hearing on Third-Party Defendant National Union Fire Insurance Company of Pittsburgh, Pa.'s ("National Union") Motion for Summary Judgment. Third-Party Defendant National Union appeared by counsel Glen A. Murphy of Spilman Thomas & Battle, PLLC. Third-Party Plaintiffs appeared by Gregory H. Schillace. Defendant Sonny Nicholson appeared by Matthew H. Nelson. This Court considered the following:

1. National Union Fire Insurance Company of Pittsburgh, Pa.'s Motion for Summary Judgment;
2. National Union Fire Insurance Company of Pittsburgh, Pa.'s Memorandum of Law in Support of Motion for Summary Judgment;
3. Response of the Third-Party Plaintiffs, Dan Cava, Steven Hall, and Dan's Car World, LLC, d/b/a Dan Cava's Toyota World to Motion for Summary Judgment of the Third-Party Defendant;
4. National Union Fire Insurance Company of Pittsburgh, Pa.'s Reply in Support of Motion for Summary Judgment;
5. Supplemental Response of the Third-Party Plaintiffs, Dan Cava, Steven Hall and Dan's Car World, LLC, d/b/a Dan Cava's Toyota World, to Motion for Summary Judgment of the Third-Party Defendant;
6. National Union Fire Insurance Company of Pittsburgh, Pa.'s Supplemental Reply in Support of Motion for Summary Judgment;
7. The exhibits attached to the pleadings listed above;

8. The entire court file;
9. Relevant legal authorities; and,
10. The parties' oral arguments.

The Court makes the following Order, to-wit:

Findings of Fact

1. On or about July 20, 2007, Plaintiff Johnnie Fluker, Jr. brought an Equal Employment Opportunity Commission ("EEOC") charge of discrimination against Dan's Car World, LLC, d/b/a Dan Cava's Toyota World, alleging that his employment had been wrongfully terminated in connection with an April 2007 employee altercation, and that he was the victim of racial discrimination and retaliation in connection with the April 2007 altercation.
2. On August 7, 2007, the EEOC sent a Notice of Charge of Discrimination to Dan Cava and Dan's Car World, LLC, d/b/a Dan Cava's Toyota World ("Third-Party Plaintiffs"), providing them with notice of the EEOC Charge.
3. On August 31, 2007, Attorney Greg Schillace, acting as counsel for Third-Party Plaintiffs, wrote a letter to the EEOC, responding to the July 20, 2007 Notice.
4. On or about April 3, 2009, Plaintiff Johnnie Fluker, Jr. filed the original Complaint in the instant lawsuit, alleging that he was subjected to a racially hostile work environment at Dan Cava's Toyota World, that his employment had been wrongfully terminated in connection with the April 2007 altercation, that he was the victim of racial discrimination and retaliation in connection with the April 2007 altercation, that the termination of his employment with Dan's Cava's Toyota World was a breach of an employment agreement, and that Dan Cava's Toyota World had violated West Virginia Code § 21-5-4 by failing to pay certain moneys owed to him upon termination of his employment.

5. Dan Cava's Toyota World, reported the April 3, 2009 Complaint to National Union on or about April 7, 2009 via a report made by Bond Insurance Agency, Inc., the insurance agent for Dan Cava's Toyota World. When providing notice, Dan Cava's Toyota World and original Defendant Sonny Nicholson did not advise National Union of the existence of the July 20, 2007 EEOC Charge. National Union did not receive a copy of the EEOC Charge until August 13, 2009.

6. Dan Cava's Toyota World is the Named Entity under an insurance policy provided by National Union, Policy Number 01-602-66-46 (hereinafter referred to as "The Policy") which has a policy inception date of February 27, 2009 and an expiration date of February 27, 2010. The Policy is a "claims made" policy requiring the **Insureds** to defend and contest any **Claim** made against them.

7. The Insuring Agreement of the Employment Practices form of coverage under the Policy states: (in relevant part):

With respect to the Insuring Agreement and the Defense Provisions of this Clause 1, solely with respect to **Claims** first made during the **Policy Period** or the **Discovery Period** (if applicable), and reported to the **Insurer** pursuant to the terms of this policy, and subject to the other terms, conditions and limitations of this policy, this **EPL Coverage Section** affords the following coverage:

This **EPL Coverage Section** shall pay the **Loss** of an **Insured** arising from a **Claim** first made against such **Insured** for any **Wrongful Act**.

The policy defines "**Claim**" to include administrative or regulatory investigations conducted by the EEOC, which are commenced by the filing of a notice of charges.

8. Because Plaintiff's EEOC claim was first made in July 2007, prior to the inception date of the policy, on November 11, 2009 National Union denied coverage on the ground that the Claim was not first made during the Policy Period. A copy of the letter was also mailed to Mark Palotta, the insurance agent for Dan Cava's Toyota World.

9. Attorney Schillace received the November 11, 2009 coverage denial letter on November 16, 2009 at 12:52 p.m. via certified mail.

10. On December 2, 2010, Third-Party Plaintiffs filed a Third-Party Complaint against National Union alleging bad faith and violations of the West Virginia Unfair Trade Practices Act (“UTPA”) for an alleged failure to defend Third-Party Plaintiffs and original Defendant Sonny Nicholson in the lawsuit by Plaintiff Johnnie Fluker, Jr.

11. On August 29, 2011, National Union filed its motion for summary judgment on the basis the Third-Party Complaint for bad faith and UTPA violations was barred by the applicable statute of limitations because it was filed on December 2, 2010, more than one year after National Union denied coverage on November 11, 2009 and after Attorney Schillace received the denial on November 16, 2009.

Conclusions of Law

1. West Virginia Rule of Civil Procedure 56(c) sets forth the general standard for granting a motion for summary judgment. Summary judgment is appropriate if:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

2. The West Virginia Supreme Court of Appeals has held:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995).

3. “Summary judgment is not a remedy to be exercised at the circuit court’s option; it must be granted when there is no genuine disputed issue of a material fact.” Powderidge Unit

Owners Ass'n v. Highland Props., Ltd., 474 S.E.2d 872, 878 (W. Va. 1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

4. “A third-party complaint filed pursuant to Rule 14(a) must be based upon a theory of derivative or secondary liability.” Christian v. Bank of N.Y. Trust Co., N.A., 2010 WL 2465478, slip op. at 2 (S.D.W. Va. 2010) referencing Laughlin v. Dell Fin. Servs., L.P., 465 F.Supp.2d 563, 566 (D.S.C. 2006). “It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal.” W. Va. Fire & Cas. Co. v. Stanley, 216 W. Va. 40, 602 S.E.2d 483 (2004) quoting Jacoby v. Brinckerhoff, 735 A.2d 347, 351 (Conn. 1999).

5. West Virginia Code § 55-2-12(c) provides:

[e]very personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued; if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

6. The West Virginia Supreme Court of Appeals has determined that “[c]laims involving unfair settlement practices arising under the [UTPA] [citation omitted] are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c).” Syl. pt. 1 of Wilt v. State Auto. Mut. Ins. Co., 203 W. Va. 165, 506 S.E.2d 608 (1998).

7. The one-year statute of limitations contained in W. Va. Code § 55-2-12(c) also applies to common law “bad faith” claims. Syl. pt. 4 of Noland v. Va. Ins. Reciprocal, 224 W. Va. 372, 686 S.E.2d 23 (2009).

8. “In a first-party bad faith claim that is based upon an insurer’s refusal to defend, and is brought under [the UTPA] and/or as a common law bad faith claim, the statute of

limitations begins to run on the claim when the insured knows or reasonably should have known that the insurer refused to defend him or her in an action.” Syl. pt. 5 of Noland.

9. West Virginia Code §55-2-21 provides:

[a]fter a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or third-party complaint: Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section. This section shall be deemed to toll the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as the action tolling the statute of limitations is pending.

10. The application of West Virginia Code §55-2-21 is dependent upon whether a third-party plaintiff’s claims are appropriately classified as third-party claims or constitute an independent cause of action. To be properly classified as a third-party claim, the allegations must arise out of the same transaction or occurrence as the original action. J. A. Street & Associates, Inc. v. Thundering Herd Development, LLC, et al., 2011 WL 5827617 (W. Va. 2011).

11. According to West Virginia Rules of Civil Procedure 13(a):

[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, **if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

12. The West Virginia Supreme Court of Appeals has found:

[to] determine whether a cross-claim arises out of the same transaction or occurrence as the original action, there are three nonexclusive factors to be considered: (1) the identity of facts and law between the initial claim and the cross-claim; (2) the mutuality of proof and whether substantially the same evidence will support

or refute both the complaint and the cross-claim; and (3) the logical relationship between the original claim and the cross-claim.

J.A. Street, 2011 WL 5827617 .

13. The Court finds and concludes as a matter of law that the same principles in J.A. Street should be applied by this Court in regard to the Third-Party Complaint against National Union because the tolling statute, at issue in J. A. Street and relied upon by Third-Party Plaintiffs in this case, applies to both crossclaims and third-party complaints alike.

14. The Court finds and concludes as a matter of law that the bad faith claims alleged in the Third-Party Complaint do not arise out of the same transaction or occurrence and are not derivative of Plaintiff Johnnie Fluker, Jr.'s claims in the original Complaint. First, the facts and law for Plaintiff Johnnie Fluker, Jr.'s wrongful termination claim are completely distinct from Third-Party Plaintiffs' bad faith claims against National Union. Second, the rights of the parties do not center upon a common factual or legal situation.

15. The Court finds and concludes as a matter of law that there is no mutuality of proof between Plaintiff Johnnie Fluker, Jr.'s claims and Third-Party Plaintiffs' claims as Plaintiff Johnnie Fluker, Jr. must prove that he was wrongfully terminated from his employment, which will require completely different evidence from that necessary to prove Third-Party Plaintiffs' claim that National Union committed any alleged bad faith. There is no overlap of evidence or facts to support or refute the allegations in both the Complaint and Third-Party Complaint.

16. The Court finds and concludes as a matter of law that there is no logical relationship between the original Complaint and the Third-Party Complaint as there is no connection between the alleged wrongful termination of Plaintiff Johnnie Fluker, Jr. and the alleged bad faith actions of National Union. Any wrongful termination of Plaintiff Johnnie

Fluker, Jr. is in no way attributable to actions or inactions of National Union and Plaintiff Johnnie Fluker, Jr. has no direct cause of action against National Union.

17. The Court finds and concludes as a matter of law that the Third-Party Complaint is an independent action because the Third-Party Complaint against National Union is not derivative of the claims asserted in Plaintiff Johnnie Fluker, Jr.'s original Complaint.

18. The Court finds and concludes as a matter of law that West Virginia Code § 55-2-21 does not apply to toll the statute of limitations applicable to Third-Party Plaintiffs' bad faith claims against National Union.

19. The Court finds and concludes as a matter of law that the statute of limitations on the bad faith claims expired on November 11, 2010 and that those claims are therefore barred.

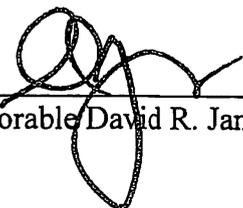
Conclusion

For the foregoing reasons, the Court **GRANTS** National Union Fire Insurance Company of Pittsburgh, Pa.'s Motion for Summary Judgment in regard to Third-Party Plaintiffs' claims of common law bad faith and UTPA violations.

Third-Party Plaintiffs' objections and exceptions to the decision of the Court are noted.

The Clerk is directed to send a certified copy of this Order, Findings of Fact, and Conclusions of Law to all counsel of record.

ENTERED this 3rd day of January, 2012

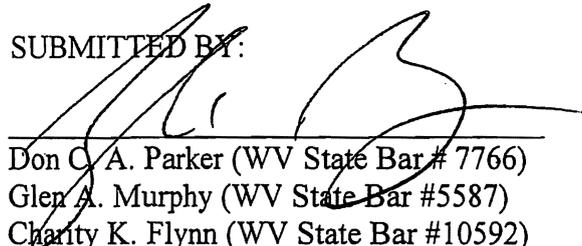


The Honorable David R. Janes, Judge

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CLERK OF THE SUPREME COURT
MORGANTHAU, WEST VIRGINIA

SUBMITTED BY:



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NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

JOHNNIE FLUKER, JR.,

Plaintiff,

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Civil Action No. 09-C-110

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NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, Pa.,

Third-Party Defendant.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE DAVID R. JANES, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2012, I served the foregoing **NOTICE OF APPEAL** upon all opposing parties by

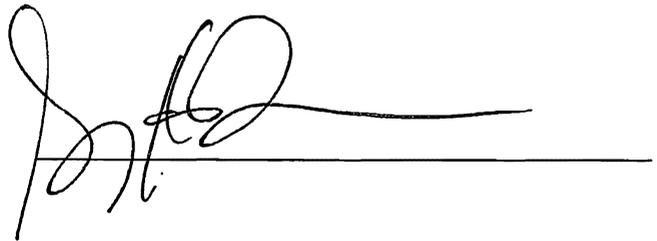
depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Barbara A. Core, Clerk
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219 Adams Street, Room 211
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A handwritten signature in black ink, appearing to be "D. C. A. Parker", written over a horizontal line.