

15-1178

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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BARRY G. EVANS and ANN M. EVANS

Plaintiffs,

v.

CIVIL ACTION NO. 11-C-606  
Judge Stucky

CMD PLUS, INC., a West Virginia corporation,  
C.K. SHAH, CHANDRAKANT N. SHAH, and  
KIMBERLY S. SHAH,

Defendants,

and

CMD PLUS, INC., a West Virginia Corporation,

Third-party Plaintiff,

v.

STATE AUTO PROPERTY INSURANCE COMPANIES  
d/b/a State Auto Property and Casualty Insurance Company,  
an Ohio company,

Third-party Defendant.

**ORDER DENYING STATE AUTO PROPERTY & CASUALTY INSURANCE  
COMPANY'S RENEWED MOTION TO DISMISS**

On October 7, 2015 came the Third-Party Plaintiff, CMD Plus, Inc., ("CMD") by counsel, Charles M. Johnstone, II, and David A. Dobson and came the Third-Party Defendant, State Auto Property & Casualty Insurance Company's d/b/a State Auto Property and Casualty Insurance Company ("State Auto"), by counsel Trevor Taylor for hearing on State Auto's Renewed Motion to Dismiss. State Auto previously filed a similar Motion which was denied by the Court by Order dated September 25, 2012. The pleadings which form the basis for review for the Court are the same pleadings which resulted in the prior denial of State Auto's initial Motion.

Based upon the appropriate pleadings, the Motion and Memoranda filed by the parties as well as oral argument, the Court hereby **DENIES** State Auto's Renewed Motion to Dismiss. The Court bases its decision on the following:

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## FINDINGS OF FACT

1. By Third-Party Complaint filed March 20, 2012, CMD asserts the follows:
  - a. It maintained a policy of commercial general liability insurance with State Auto;
  - b. CMD paid all premiums for the applicable insurance policy;
  - c. On or about March 9, 2009 it was alleged by the Plaintiffs in the underlying action that construction activities of CMD caused or contributed to the movement of surface water, storm water, mud and debris causing damage to Plaintiffs below;
  - d. The Plaintiffs below notified CMD and, in turn, CMD notified of State Auto to make claim under the commercial general liability policy;
  - e. Despite continued requests by CMD to from State Auto to take action under the policy, State Auto did nothing for approximately ten (10) months which delay resulted in the damages becoming much worse;
  - f. As a result of State Auto's delay in taking action on the claims, a landslide occurred which caused further damages to the Plaintiffs below, CMD and the Charleston Sanitary Board;
  - g. After further delay, State Auto finally took action and paid all costs to relocate the City of Charleston's Sanitary Sewer Line on the property of CMD;
  - h. However, State Auto continued its inaction and violations of duties owed regarding the initial claims of Plaintiffs below and CMD; and
  - i. As of the filing of its Third-Party Complaint in March 2012, State Auto still had done nothing in furtherance of the claims that were initially made.
  
2. In Count I of the Third-Party Complaint, CMD asserts a claim for common law bad faith as follows:
  32. At all times relevant herein, State Auto was subject to the laws of the State of West Virginia pertaining to the appropriate and lawful conducting of the business of insurance.

33. At all times relevant herein, State Auto had a duty and legal obligation to CMD to make a full investigation of CMD's claims and to effectuate a prompt, fair and equitable settlement of those claims.
34. Through the following actions described herein and specifically by:
  - a. its delay in investigating and taking action on claims made by and on behalf of CMD and the Plaintiffs;
  - b. by its refusal to effectuate the necessary repairs to the Shah Property and the Evans Property; and
  - c. by its delay in handling, facilitating and approving repair and/or relocation of the sanitary sewer line,

State Auto breached its common law duty of good faith and fair dealing to CMD such that its conduct amounts to "bad faith" as recognized in the seminal case of *Hayseeds v. State Farm Fire and Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

35. As a direct and proximate result of State Auto's "bad faith" and its breach of common law duty of good faith and fair dealing, CMD is entitled to recover from State Auto its damages permitted under *Hayseeds*, including but not limited to, the insured's damages for net economic loss caused by the delay in investigation, and resolution of its claim, attorneys' fees, as well as general damages for annoyance and inconvenience, mental anguish, emotional distress and damage to its reputation.

3. In Count II of the Third-Party Complaint, CMD asserts violations of the West Virginia unfair trade practices act as follows:

39. At all times relevant herein, State Auto was subject to the laws of the State of West Virginia pertaining to the appropriate and lawful conducting of the business of insurance including but not limited to the statutory sections and

their intended regulations known as the West Virginia Unfair Trade Practices Act ("UTPA"), *West Virginia Code* § 33-11-1, *et seq.*

40. At all times relevant herein, State Auto failed to act reasonably promptly with respect to the subject claim of CMD for coverage in direct violation of *West Virginia Code* § 33-11-4(9)(b).
41. At all times relevant herein, State Auto failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of either the Plaintiffs' claims or CMD's claims in direct violation of *West Virginia Code* § 33-11-4(9)(f).
42. As a result of its acts and omissions, State Auto has forced the Plaintiffs, and, now, CMD to institute litigation in order to obtain the coverage due CMD per the Insurance Policy, thus constituting a direct violation of *West Virginia Code* § 33-11-4(9)(g).
43. The conduct of State Auto as described hereinabove is part of a general business practice and constitutes unfair claims settlement practices under West Virginia law, and specifically under the provisions of *West Virginia Code* § 33-11-4(9).
44. As a direct proximate foreseeable result of the acts and omissions of State Auto, CMD has and continues to suffer damages, including but not limited to:
  - a. economic losses directly related to State Auto's delay in investigating and acting upon the Plaintiffs' claims, which if are legitimate, are covered under the Insurance Policy;
  - b. delay and failure to effectuate prompt and good faith settlement of outstanding claims;
  - c. attorneys' fees;
  - d. general damages for lost business opportunities; and

e. damage to reputation.

4. In Count III of the Third-Party Complaint, CMD asserts breach of contract as follows:

47. By contract, State Auto agreed to satisfy all legitimate claims made against CMD which were covered under the Insurance Policy.
48. Although State Auto does not dispute that the claims asserted in this civil action by the Plaintiffs are indeed covered claims under the Insurance Policy, State Auto has refused and therefore breached its contractual obligation to satisfy these claims.
49. Despite the fact that adequate coverage was available under the Insurance Policy, State Auto breached its duty to CMD by failing to satisfy the claims of the Plaintiffs as asserted in this civil action.
50. In accord with the Insurance Policy, CMD is legally entitled to these aforementioned actions on the part of State Auto.
51. State Auto has breached its contractual obligations to satisfy the Plaintiffs' claims and/or failing to effectuate the necessary repairs to the Evans Property in accord with the Insurance Policy; and by failing to effectuate the necessary repairs and improvements to the Shah Property in accord with the Insurance Policy, among other obligations.
52. At all times relevant herein, State Auto failed to make available to CMD coverage under the Insurance Policy.
53. At all times relevant herein, State Auto was in breach of contract with CMD in regards to the Insurance Policy.
54. As a result of the breach of contract by State Auto, CMD suffered damages, including but not limited to: insured's damages for net economic loss caused by delay in settlement, attorneys' fees, as well as general damages

for annoyance and inconvenience, mental anguish, emotional distress and damage to its reputation.

55. As a direct, proximate, foreseeable result of the breach of contract and other duties owed by State Auto to CMD, CMD has and continues to suffer the following damages:
- a. Any and all damages to the Plaintiffs as a result of the alleged incident and any other claims asserted in this litigation;
  - b. Damages relating to its delay in investigating and taking action on claims made by and on behalf of CMD and the Plaintiffs;
  - c. Damages relating to State Auto's refusal to effectuate the necessary repairs to the Shah Property and the Evans Property;
  - d. Damages relating to State Auto's delay in handling, facilitating, approving and effectuating repair and/or relocation of the sanitary sewer line;
  - e. Attorneys' fees;
  - f. General damages for lost business opportunities;
  - g. Damage to its reputation; and
  - h. General damages for annoyance and inconvenience, mental anguish, and emotional distress.

#### CONCLUSIONS OF LAW

1. The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice. *Cantley v. Lincoln County Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007).

2. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, 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.” *Syl. Pt. 3, Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

3. Motions to Dismiss are viewed with disfavor, and the Supreme Court of Appeals counsels lower Courts to rarely grant such motions. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

4. Only matters contained in a pleading can be considered on a Motion to Dismiss for failure to state a claim upon which relief could be granted. *U.S. Fidelity & Guaranty Company v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965).

5. Viewing the four corners of the Third-Party Complaint and viewing all the facts in the light most favorable to CMD, the Court finds that the Third-Party Plaintiff has asserted claims upon which it can prevail.

6. A first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. *State of West Virginia ex rel Allstate Insurance Company v. Gaughan*, 508, S.E. 2d 75, 203 W.Va. 358 (1998).

7. In Count I of the Third-Party Complaint, CMD asserts a proper first-party bad faith claim upon which relief may be granted.

8. The Unfair Trade Practices Act creates a positive duty independent of any insurance contract, and a cause of action may be maintained based on the violation of the statutory duty. *Taylor v. Nationwide Mutual Insurance Company*, 589 S.E. 2d 55, 214 W.Va. 324 (2003).

9. In Count II of the Third-Party Complaint, CMD properly sets forth a claim against State Auto alleging violations of the Unfair Trade Practices Act upon which relief may be granted.

10. Insurance policies are controlled by the Rules of Construction that are applicable to contracts generally. *Blake v. State Farm Mutual Automobile Insurance Company*, 224 W.Va. 317, 685 S.E.2d 895, (2009).

11. A Complaint which alleges a contract, a breach thereof which results in damages meets the standard to defeat a motion to dismiss. *Harper v. Consolidated Bus Lines*, 117 W.Va. 228, 185 S.E. 225 (1936).

12. In Count III of the Third-Party Complaint, CMD properly sets forth a claim against State Auto alleges breach of contract upon which relief may be granted.

WHEREFORE, it is **ORDERED, ADJUDGED** and **DEGREED** that State Auto Property & Casualty Insurance Company's Renewed Motion to Dismiss is **DENIED**.

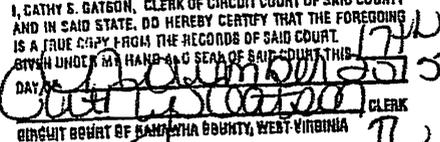
All objections and exceptions to this Order by all aggrieved parties are hereby noted, preserved and maintained for the records.

Entered this 9 day of NOV 2015

  
JAMES C. STUCKY, JUDGE

Prepared by:

  
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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF NOVEMBER 2015  
  
CATHY S. GATSON CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA