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United States District Court,
D. Oregon.

Joseph and Victoria FORMOSA, Plaintiffs,
v.
GREAT NORTHWEST INSURANCE COMPANY, Defendant.

Civ. No. 6:13–cv–00789–TC. | Signed Sept. 4, 2014.

Attorneys and Law Firms

R. Scott Taylor, Clinton L. Tapper, Taylor & Tapper, Eugene, OR, for Plaintiffs.

Robert Selden May, Smith Freed & Eberhard, Portland, OR, for Defendant.

OPINION AND ORDER

MICHAEL J. McSHANE, District Judge.

***1** Plaintiffs Joseph and Victoria Formosa bring this action seeking damages for alleged breach of an insurance policy covering their home. Plaintiffs and defendant filed motions for summary judgment. Magistrate Judge Thomas M. Coffin issued a Findings and Recommendation (F & R) on July 21, 2014, in which he recommended that this Court deny plaintiffs' motion and award summary judgment to defendant on all claims except for plaintiffs' replacement structure claim. [1] The matter is now before this Court. 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b).

Because no objections to the F & R were timely filed, this Court reviews only the legal principles *de novo. United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (en banc); *see also United States v. Bernhardt*, 840 F.2d 1441, 1444–45 (9th Cir.1988) (citations omitted). Having reviewed the legal principles *de novo*, this Court finds no error in Judge Coffin's F & R, ECF No. 47.

CONCLUSION

This Court ADOPTS Judge Coffin's F & R, ECF No. 47, in full. Accordingly, plaintiffs' motion for partial summary judgment, ECF No. 15, is DENIED, and defendant's motion for summary judgment, ECF No. 19, is GRANTED IN PART and DENIED IN PART. [2]

IT IS SO ORDERED.

FINDINGS AND RECOMMENDATION

THOMAS M. COFFIN, United States Magistrate Judge.

Plaintiffs brings this action for breach of contract against their insurance company after plaintiffs' home burned down. Presently before the court are the parties' cross motions for summary judgment. As discussed in further detail below, this action should be dismissed.

Legal Standard

Federal Rule of Civil Procedure 56 allows the granting of summary judgment:

> if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c). There must be no genuine issue of material fact. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247–48 (1986).

The movant has the initial burden of establishing that no genuine issue of material fact exists or that a material fact essential to the nonmovant's claim is missing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). Once the movant has met its burden, the burden shifts to the nonmovant to produce specific evidence to establish a genuine issue of material fact or to establish the existence of all facts material to the claim. *Id.; see also, Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir.1991); *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir.2000). In order to meet this burden, the nonmovant "may not rely merely on allegations or denials in its own pleading," but must instead

"set out specific facts showing a genuine issue of fact for trial." Fed.R.Civ.P. 56(e).

Material facts which preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. *Anderson*, 477 U.S. at 248. Factual disputes are genuine if they "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* On the other hand, if, after the court has drawn all reasonable inferences in favor of the nonmovant, "the evidence is merely colorable, or is not significantly probative," summary judgment may be granted. *Id.*

Discussion

ALL CLAIMS AGAINST DEFENDANT SHOULD BE DISMISSED

A. *Personal Property*

***2** Ironically, plaintiffs contend there was a breach of contract in that defendant eventually paid the full limits of coverage under the insurance policy for the claim for personal property lost in the fire. Plaintiffs argue that payment of policy limits was an admission of breach. This argument is not persuasive. The policy limits were paid promptly as soon as the investigation into the personal properly claim was finished. Plaintiffs filed this action on the same day their Examinations Under Oath were taken. At the Examinations, defendant finally received information to support plaintiffs' personal property claim. Defendant paid the claim in full just eight business days later.

Plaintiffs do not dispute that the claim was never denied but was paid in full. Plaintiffs have stated they are not claiming a breach of a specific policy provision, but rather a breach of the duty of good faith and fair dealing. The fact that defendant paid the policy limits is not evidence of a breach of the duty of good faith or an admission of breach and plaintiffs cite no persuasive cases to support their interpretation of the payment of coverage limitation as evidence of breach especially where there was a delay in plaintiffs' cooperation with the investigation.[1] Plaintiffs do not appear to dispute that defendant has a right under both the contract and the law to conduct an investigation and clarify uncertain claims. Defendant has adequately demonstrated that despite defendant's diligence in seeking cooperation, plaintiffs failed to cooperate by not providing an inventory of their personal property until more than seven months after the loss and that such was wilful on the part of plaintiffs. *See generally, Bailey v. Universal Underwriters Ins. Co.*, 258 Or. 201; *Rosalez v. Unigard Ins. Co.*, 283 Or. 63 (1978). (In denial of claim case, affirmative defense of failure to cooperate demonstrated by insurance company by showing it diligently sought plaintiffs cooperation, insured wilfully failed to cooperate and insurance company was prejudiced by such).

On the day after the fire, defendant made an appointment with plaintiffs to begin the process of submitting their personal property claim. Plaintiffs cancelled the appointment and had engaged a public adjuster. Four months later defendant asked about the status and when it could expect to receive the claim for its review and consideration. Defendant did not receive a response. The claim was still not submitted within 6 months of the fire. Defendant again requested the information and noted it was patiently awaiting the information and repeated that same request two weeks later.

Plaintiffs' actions of delay were sufficiently wilful in that plaintiff Victoria Formosa's deposition testimony indicates that she knew what she was doing, intended to do what she was doing and was free to do so. Exh. 6 to Dec. of May, p.p. 17, 24, 25; *See, State ex. rel. Nilsen v. Johnston*, 233 Or. 103, 108 (1962); *Charter v. Oak Fire Ins. Co. V. Interstate Mechanical Inc.*, 958 F.Supp.2d 1188, 1203 (D.Or.2013) (if plaintiffs intentionally though passively resist, that is sufficient for wilful conduct).

***3** Defendant was sufficiently prejudiced by plaintiffs' delay as defendant could not review the case without the information in plaintiffs' control and because it needed to take plaintiffs Examinations under oath to get the information.

Defendant's actions and the timing of such with respect to plaintiff's personal property claim do not amount to a breach and this claim should be dismissed.

B. *Replacement Structure*

The parties agree that this claim is not fully ripe. Without commenting on the viability of the claim, this court recommends the replacement structure claim be dismissed without prejudice.

C. *Road Replacement*

Plaintiffs contend there is a breach because defendant did not pay for the building of their road to a new location of their homesite on their property. Defendant does not dispute that if rebuilding, replacing or relocating of the road were required by an ordinance or law, the costs to do so would be covered by the insurance policy. Plaintiffs have presented no evidence in the record that their replacement of the road was required by any ordinance or law. Instead, it was required to by their choices to build the home at a different location on their property.

In order to be covered, building an entirely new road to a different location would need to fall under one of the categories of coverage in the policy. The road was not "damaged by a peril insured against" and therefore replacement or repair cannot be covered by Section 11(1) of the policy.

There was no showing that the road was "totally demolished" because of damage by a Peril Insured Against to the home or garage. The plaintiffs have submitted no such evidence in the record to argue that any law or ordinance or requirement of construction mandated the demolition and reconstruction of the road. Therefore, there is not coverage for the road from Section 11(2) of the policy.

There also is no evidence that the new road was "necessary" to complete the replacement of the home or that the portion of the road which existed at the time of the fire is being "remodeled," "rebuilt," or "replaced." Plaintiffs have not presented any evidence that placing the replacement home at the new site on the same property was "necessary." The clear evidence is that the plaintiffs chose, for their own reasons, to relocate the house.

Plaintiffs have built an entirely new road on ground that was not previously a road, to access an entirely new location for their home. The old road was not remodeled, it was abandoned. The old road was not rebuilt, it was left in the same state as at the time of the fire. The old road was not replaced as it continues to stand where it was and as it is, allowing access to the same site. What plaintiffs are seeking is payment for an entirely new structure to access their replacement home. There is not coverage for such payment in the policy from Section 11(3) or elsewhere.

D. ***Trees, Shrubs and Plants, Debris Removal, Alleged Misrepresentations***

***4** Plaintiffs have produced no evidence disputing that defendant's payment of $2, 657 for the replacement of trees, shrubs and plants was insufficient or otherwise caused them actionable damage. Debris removal expenses were also paid.

Plaintiffs have also made vague allegations of misrepresentations. However, plaintiffs have not presented any evidence that any alleged misrepresentations on debris removal, ordinance and law coverage, or particular contract language was relied on and prevented them from receiving any payment owed, or otherwise caused the lack of fulfillment of the essential purpose of the contract.

E. ***Living Expenses***

The insurance policy requires payment for additional living expenses for the "shortest time required to repair or replace the damage." Section A.1.

Plaintiffs' contractor testified at deposition that it would take about 4 months to rebuild and the entire process to do all the permitting, plan review, and site preparation from the time plaintiffs' decided to rebuild would be about 9 months. An estimate soon after the loss put that time at 10 months. There is no evidence that the "shortest time required" could be longer than 10 months. Defendant paid additional living expenses for 11 and-a-half months. Although it is plaintiffs' prerogative to delay rebuilding, defendant is not required to pay additional living expenses indefinitely during this time and such is not a breach in the circumstances of this case. This claim should be dismissed.

Conclusion

Plaintiffs' motion (# 15) for partial summary judgment should be denied and defendant's motion (# 19) for summary judgment should be allowed as to all claims with the exception of the replacement structure claim. That claim should be dismissed without prejudice. This action should be dismissed.

Footnotes

1 The parties agree that plaintiffs' replacement structure claim is not fully ripe. *See* Findings & Recommendation 4, ECF No. 47.

2 Defendant's motion is denied as to plaintiffs' replacement structure claim. That claim is not yet ripe and is dismissed without prejudice.

1 Plaintiffs' citation to *Dockins v. State Farm Ins. Co.*, 329 Or. 20 (1999) is not helpful to plaintiffs or persuasive in the circumstances of this action where plaintiffs delayed the provision of information in their control during the carrier's investigation into their loss.

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