STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

Tudor Oaks Townhouse Association, Inc., Plaintiff, vs. Hiscox Insurance Company, Inc., Defendant.	Court File No.: 62-CV-20-3621 Case Type: Contract

ORDER & MEMORANDUM

This matter came before the undersigned on February 15, 2022, upon Plaintiff's motion to amend the Complaint. Plaintiff was represented by Attorney Ross Hussey. Defendant was represented by Attorney Christopher Goodman.

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiff's motion to amend the Complaint is **GRANTED**.
2. Plaintiff shall serve Defendants with the Amended Complaint pursuant to the Minnesota Rules of Civil Procedure by May 27, 2022.
3. The parties shall meet with the court in a status conference on July 19, 2022 at 9am.
4. The attached Memorandum shall be incorporated into this Order.

BY THE COURT:

Gilligan, Thomas(Judge)
May 13 2022 8:57 AM

Dated: May 12, 2022

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

MEMORANDUM

This lawsuit relates to a dispute over whether an insurance policy (the "Policy") issued by Defendant Hiscox Insurance Company, Inc. ("Hiscox") to Plaintiff Tudor Oaks Townhouse Association, Inc. ("Tudor Oaks") covers property damage that Tudor Oaks claims it sustained during a June 11, 2017 storm. Tudor Oaks brought a motion to amend its Complaint to allege a claim for bad faith under Minn. Stat. § 604.18 and to amend its claim for Declaratory Judgment to reflect that an appraisal has already occurred.

Tudor Oaks contends that it has established a prima facie claim of bad faith; namely that it has produced enough evidence for a factfinder to conclude: (1) there was the absence of a reasonable basis for denying the benefits of the Policy; and (2) that Hiscox either knew of the lack of reasonable basis for denying benefits under the Policy, or acted in reckless disregard of the lack of a reasonable basis for denying those benefits. Tudor Oaks maintains that Hiscox accepted the Sworn Proof of Loss on the claim, and that the claim was submitted to appraisal, yet Hiscox waited until after the appraisal award to raise defenses that Tudor Oaks failed to provide prompt notice of its claim and that Tudor Oaks failed to provide a timely notice of repairs.

In response, Hiscox contends that Tudor Oaks' motion to amend is untimely, prejudicial, and does not meet its burden to amend under Minn. Stat. § 604.18. Hiscox claims that Tudor Oaks filed its motion too late under the current scheduling order and would create delay in hearing Hiscox's motion for summary judgment, and that any amendment to allow a bad faith claim would be futile because it would not survive a motion for summary judgment. Hiscox also contends that Tudor Oaks failed to provide prompt notice of its claim and that

such a failure to satisfy conditions precedent excuses Hiscox of its coverage obligations and precludes bad faith damages. Finally, Hiscox maintains that the claim was resolved in appraisal, therefore Tudor Oaks is not entitled to make a claim for bad faith damages.

Hiscox does not address Tudor Oaks' motion to amend the Declaratory Judgment claim to reflect that an appraisal has already occurred.

Tudor Oaks contends that a hail and windstorm on June 11, 2017 caused damage to its townhouses. Tudor Oaks reported a property damage claim to Hiscox on May 24, 2019. Hiscox retained an independent adjusting firm, Engle Martin & Associates ("Engle Martin") to investigate the claimed loss. On June 27, 2019, Engle Martin sent a reservation of rights letter to Tudor Oaks on behalf of Hiscox, which indicated that it was investigating the claim and was not waiving any of Hiscox's rights or defenses. On December 30, 2019, Engle Martin concluded that the damage found by its retained expert was not caused by the June 11, 2017 hail and windstorm.

Tudor Oaks commenced this lawsuit against Hiscox on June 11, 2019. It filed the Summons and Complaint with this court nearly a year later on June 4, 2020.

During the course of its investigation, Hiscox demanded and received various documents from Tudor Oaks and conducted an examination under oath ("EUO") of Tudor Oaks' property manager, Richard Easton ("Easton") of Advantage Townhome Management ("Advantage") on October 15, 2020. Tudor Oaks demanded an appraisal. The appraisal hearing took place on December 17, 2020. The appraisal panel awarded Tudor Oaks $251,354.62 in actual cash value and $415,496.22 in replacement cost value and determined that Tudor Oaks' townhomes had been damaged by hail on June 11, 2017. On January 22,

2021, counsel for Hiscox observed that the investigation and Easton's testimony raised several issues, including: (1) whether Tudor Oaks had actual or constructive knowledge about damage caused by the June 11, 2017 near that date, but failed to report it until two years later; and (2) whether Tudor Oaks notified Hiscox that repairs were commenced within 200 days of the storm. Hiscox's counsel indicated that its coverage analysis was not complete and demanded additional documents. To date, Hiscox has not denied coverage and has not paid the appraisal award.

This court issued its initial Scheduling Order on August 3, 2021. The parties twice stipulated that they remained in the process of investigation and discovery, and sought to extend the discovery, mediation, and dispositive motion deadlines. This court issued a second Scheduling Order on December 27, 2021 and a third Scheduling Order on January 26, 2022, which extended the deadlines as requested by the parties.

Following the hearing on the motion to amend the Complaint, this court issued an Order on February 16, 2022 which suspended the pretrial schedule and cancelled a forthcoming dispositive motion hearing. The court took the motion to amend the Complaint under advisement.

STANDARD OF REVIEW

The parties suggest that this court should review Tudor Oaks' motion to amend the Complaint under both Minn. R. Civ. P. 15.01 and Minn. Stat. § 604.18.

In the ordinary civil case, a party seeking to amend a pleading must obtain the written consent of a party or must seek leave of the district court. *See* Minn. R. Civ. P. Rule 15.01. The district court has wide discretion in permitting or denying a party leave to amend its

complaint after a responsive pleading has been filed, and leave shall be given "freely" when "justice so requires." Minn. R. Civ. P. 15.01; *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 272 (Minn. 2008). In general, "unless a party opposing amendment to pleadings can establish some prejudice other than merely having to defend against additional claim or defense, amendment will be allowed." *Envall v. Independent School Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. Ct. App. 1987).

Although Rule 15 directs courts to give leave to amend freely where justice so requires, Section 604.18, subd. 4(a), imposes a more demanding two-step requirement for a court to "exercise a gatekeeping function to review these claims before they can proceed." *Friedberg v. Chubb & Son, Inc.*, 800 F. Supp. 2d 1020, 1024 (D. Minn. 2011). To succeed on a motion to amend a complaint to assert a bad faith claim, a plaintiff must make a prima facie showing of the factual basis for the claim and must be accompanied by one or more affidavits. Minn. Stat. § 604.18, subd. 4(a). That evidence must show: (1) the absence of a reasonable basis for denying the benefits of the insurance policy; and (2) that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy. Minn. Stat. § 604.18, subd. 2(a)(1-2). A prima facie claim for bad faith, therefore, has two elements: one objective and the other subjective. *See Friedberg*, 800 F. Supp. 2d at 1025. The insurer may oppose the motion, "by the submission of one or more affidavits showing there is no factual basis for the motion." Minn. Stat. § 604.18, subd. 4(a). If the district court determines that there is prima face evidence in support of the motion, it "may grant the moving party permission to amend the pleadings to claim taxable costs under this section." *Id.*

ANALYSIS

The Minnesota Supreme Court interpreted the two-pronged test for evaluating bad faith claims under Minn. Stat. § 604.18 in *Peterson v. W. Nat'l Mut. Ins. Co.*, 946 N.W.2d 903, 910 (Minn. 2020). The inquiry under the first prong "is whether a reasonable insurer under the circumstances would not have denied the insured the benefits of the insurance policy." *Id.* An insurer's evaluation of the claim must be "fair." *Id.* A fair evaluation "considers and weighs all of the facts and circumstances that a reasonable insurer would consider relevant." *Id.* The second prong considers the "mens rea" of the insurer's conduct. *Id.* at 912. The Minnesota Supreme Court has explained "this subjective inquiry concerns whether the insurer knew, or recklessly disregarded information that would have allowed it to know, that it lacked an objectively reasonable basis for denying the claim." *Id.* In this regard, the "actual investigation and evaluation are relevant to this prong of the analysis." *Id.*

IT IS PREMATURE TO DETERMINE WHETHER THE APPRAISAL RESOLVED THE CLAIM

Hiscox contends that since the claim was resolved in appraisal, bad faith damages are precluded under Minn. Stat. § 604.18, subd. 4(c). This provision states that: "An award of taxable costs under this section is not available in any claim that is resolved or confirmed by arbitration or appraisal." *Id.* According to Hiscox, since appraisals resolve disputes over the amount owed for a claim, and Tudor Oaks' claim was "resolved" by "appraisal," Tudor Oaks cannot make a bad faith claim. Alternatively, Hiscox contends that Subdivision 4(c) is ambiguous and that legislative history helps confirm that the Minnesota Legislature "intended subd. 4(c) to excuse insurers from liability for bad faith damages if the claim is subject to an ADR proceeding."

Tudor Oaks responds that Subdivision 4(c) does not preclude a bad faith claim here because its claim has not been resolved by appraisal. If that were true, according to Tudor Oaks, Hiscox would have paid all or part of the award. Tudor Oaks further argues that if Subdivision 4(c) was interpreted in the way Hiscox has proposed, it would shield an insurer from bad faith if it submitted to appraisal and then denied the claim knowing it lacks a reasonable basis to do so.

Whether this provision applies hinges on whether or not Tudor Oaks' claim has been "resolved" through the appraisal process. While the record clearly shows that the claim was submitted to an appraisal panel, which issued an award, there remains a dispute about whether it has been resolved. Apparently, Hiscox contends that the issuance of the appraisal award resolved the claim, despite the fact that it has refused to pay the award and the award remains outstanding. Tudor Oaks contends that the only way the claim could be resolved would be for Hiscox to pay the appraisal award. This court need not decide, at the motion to amend stage, whether Minn. Stat. § 604.18, subd. 4(c) precludes Tudor Oaks' bad faith claim.

TUDOR OAKS HAS MET ITS BURDEN UNDER THE OBJECTIVE PRONG

Tudor Oaks contends that it submitted a Sworn Proof of Loss for damage to its townhomes due to wind and hail, which is a covered loss under its policy with Hiscox. It also contends that it obtained an appraisal award for damage to its townhomes which an appraisal panel determined was caused by the June 11, 2017 storm. It contends that despite complying with its policy of insurance, Hiscox has neither paid the appraisal award, nor denied Tudor Oaks' claim, which has left Tudor Oaks in a state of limbo, nearly five years after the loss.

Tudor Oaks argues that, in effect, Hiscox has not fairly evaluated its claim. It contends that Hiscox did not raise the issues of any delinquency in providing prompt notice of the claim, or a notice of repair within 200 days, until more than a year and a half after it received Tudor Oaks' notice of claim. According to Tudor Oaks, Hiscox's only articulated basis until January 22, 2021 for not paying the claim was that there was no property damage to the townhouses caused by the June 11, 2017 storm. Tudor Oaks argues that it was only after receiving the appraisal award and Tudor Oaks' demand for payment that Hiscox came up with its "issues" concerning prompt notice.

Tudor Oaks argues that a reasonable insurer would not advance a basis for failing to pay a claim (no damage occurred), wait until an adverse appraisal award to issue, then advance a new basis for failing to pay a claim (lack of prompt notice), base its decision not to pay the claim solely on facts advantageous to its newly advanced theory, and fail to deny the claim three years after being put on notice. Hiscox bases its opposition on this prong on the fact that it promptly issued a reservation of rights and investigated the claim despite some non-cooperation from its insured, and that it raised the notice issue after its investigation was complete enough to support it.

It does not appear from this record that a reasonable insurer would rely only on facts favorable to its coverage position, rather than considering and weighing the facts revealed in a full investigation. It also does not appear from this record that a reasonable insurer would be unable or unwilling to issue a denial of the benefits of an insurance policy, after having conducted a full investigation and an appraisal hearing, nearly three years after being put on notice of the claim.

Tudor Oaks has met is prima face burden under the first prong of Section 604.18 that Hiscox did not consider and weigh all the facts and circumstances that a reasonable insurer would consider relevant. Hiscox has not established that "there is no factual basis for this motion." Accordingly, this court will move on to the second prong.

TUDOR OAKS HAS MET ITS BURDEN UNDER THE SUBJECTIVE PRONG

The second prong of the Section 604.18 analysis is a subjective test that evaluates the conduct of the insurer that denied the claim. This "quality-of-investigation" inquiry, therefore, analyzes evaluates how an insurer handled a claim.

From the outset, Hiscox questioned whether the claim for the June 11, 2017 storm was a manufactured claim prompted by a public adjuster, rather than an authentic claim. It contended for a significant period of time that there was no damage caused to Tudor Oaks' townhomes from that storm (and had also denied a previous hail claim that Tudor Oaks was pursuing for apparently the same reason). Only after Tudor Oaks produced extensive records, presented its property manager for an EUO, and went through an appraisal hearing which awarded it damages under the Hiscox policy, did Hiscox raise "issues" about notice. While the notice "issues" are supported by the language of the policy, it does not appear that they are supported by the facts revealed by Hiscox's investigation of the claim.

Tudor Oaks contends that its extensive records do not show that it knew of any damage to its townhomes from the June 11, 2017 storm until 2019. In light of that information, it argues that Hiscox knew that it lacked an objectively reasonable basis for its failure to pay the benefits available under the policy or the appraisal award. Instead, according to Tudor Oaks, the basis for Hiscox's refusal to pay the appraisal award is based upon a misconstruction of

Easton's testimony and upon a completely new factual theory that was only advanced in opposition to this motion. Hiscox maintains that: (1) Easton was Tudor Oaks' property manager on the date of loss; (2) he may have been told by a Tudor Oaks homeowner that there was a storm on the date of loss; (3) he is employed by Advantage; (4) Advantage was also the property manager for the nearby Raspberry Ridge Homeowners Association, Inc. ("Raspberry Ridge"); (5) Raspberry Ridge is 2.5 miles from Tudor Oaks; and (6) Raspberry Ridge's board of directors authorized an inspection of its property for hail damage on June 12, 2017. Accordingly, Hiscox maintains that Tudor Oaks must have known about the loss on or about June 12, 2017.

The first problem with all of this, as Tudor Oaks points out, is that there is no suggestion that Easton passed on to Tudor Oaks' board any information concerning the June 11, 2017 storm. While Tudor Oaks had submitted another claim for hail damage to Hiscox for hail loss which occurred in 2016 and was in the process of pursuing it, there is nothing in the investigation which suggests that Tudor Oaks was aware of damage caused by the June 11, 2017 until sometime after it was contacted by a public adjuster in 2019. The second problem is that there is nothing in the record before this court which indicates that Easton learned through his employment with Advantage that another Advantage property manager for a different set of townhomes knew those other townhomes had experienced hail or wind damage due to the June 11, 2017 storm. Put simply, Hiscox has neither connected a homeowner's comment, which may or may not have occurred, regarding the June 11, 2017 storm, nor the knowledge of a separate property manager for a separate townhome association, to Tudor Oaks.

Tudor Oaks has submitted evidence to demonstrate that Hiscox's coverage "issues" were based upon a speculative connection to the facts revealed by its investigation and seem to be something of a moving target. Presumably, an insurer with a sound basis to decline coverage for failure to provide prompt notice would do so, rather than demanding more investigation and more documents years after the claim was made. Tudor Oaks has met its burden at this stage to demonstrate that Hiscox may have recklessly disregarded information that a reasonably objective insurer would not have disregarded to effectively "deny[ ] the benefits" for Tudor Oaks' storm losses. Minn. Stat. § 604.18, subd. 2(a) (1–2).

Tudor Oaks' motion to allege a claim under Section 604.18 is therefore granted.

TUDOR OAKS MAY AMEND ITS DECLARATORY JUDGMENT CLAIM

Tudor Oaks also moved to amend its Declaratory Judgment claim to change the last sentence of Paragraph 18 from "Pursuant to the Policy, the appraisal clause of the Policy is the appropriate remedy for this dispute." to "Pursuant to the Policy, the appraisal award has already determined the valuation of these repair costs." Hiscox does not address this part of Tudor Oaks' motion to amend.

Since this proposed amendment does not add a new claim, makes what amounts to an assertion of fact, and does not prejudice Hiscox, that motion is granted. Tudor Oaks may substitute the language it has proposed in Paragraph 18 of the Complaint.

HISCOX WILL NOT SUFFER UNFAIR PREJUDICE IF THE COMPLAINT IS AMENDED

Hiscox devoted much of its opposition to the fact that the amendment to allege a claim under Section 604.18 will upend the pretrial schedule. While it is true that the addition of this claim creates a claim that Hiscox will have to defend against, and may cause it to hire an expert

witness, any delay under the circumstances is not unfairly prejudicial. Hiscox and Tudor Oaks have already agreed to several postponements of deadlines in the case. Further, this court has already suspended the current Scheduling Order and cancelled the hearing on Hiscox's motion for summary judgment.

The parties shall meet and confer on a new Scheduling Order and shall discuss appropriate pretrial deadlines for limited discovery, expert disclosures, dispositive motions and trial. A status conference will take place via Zoom on July 19, 2022 at 9am.

CONCLUSION

In sum, Tudor Oaks' motion to amend the Complaint is granted. It must file and serve an Amended Complaint by May 27, 2022.

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