UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

70TH COURT CONDO ASSOCIATION,

Plaintiff,

v.

OHIO SECURITY INSURANCE COMPANY and DONAN ENGINEERING CO., INC.,

Defendants.

No. 16 CV 7723

Judge Manish S. Shah

ORDER

Ohio Security's motion to dismiss Counts I and II, [27], is granted. Donan Engineering's motion to dismiss Count III, [30], is denied. Counts I and II are dismissed, Count III is not dismissed. Donan Engineering shall answer the complaint by April 7, 2017. A status hearing remains set for March 28, 2017 at 9:30 a.m.

STATEMENT

Plaintiff 70th Court Condo Association filed suit against defendants Ohio Security Insurance Company and Donan Engineering, after the insurance company refused to reopen a claim for hail damage. Ohio Security moved to dismiss the first complaint, and I granted that motion in part. *See* [22].[1] Plaintiff amended the complaint, but virtually all of the facts outlined below also appeared in the original complaint. Count I alleges a breach of contract claim against Ohio Security. Count II alleges that Ohio Security must pay attorneys' fees for its vexatious conduct in violation § 155 of the Illinois Insurance Code. Count III alleges a negligence claim against Donan Engineering. Ohio Security moves to dismiss Counts I and II. Donan Engineering moves to dismiss Count III.

Legal Standard

A motion to dismiss should be granted when the complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *see Avila v. CitiMortgage, Inc.*, 801 F.3d 777, 781 (7th Cir. 2015). A complaint must "state a claim to relief that is plausible on its face." *McReynolds v. Merrill Lynch & Co.*, 694

[1] Bracketed numbers refer to entries on the district court docket.

F.3d 873, 885 (7th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts may only consider the pleadings and any documents attached to the motion to dismiss if those documents are referred to in the complaint and are central to the plaintiff's claim.[2] *Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963, 975 (7th Cir. 2013) (citations omitted). In reviewing the pleadings and any related documents, courts must construe all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011). Legal conclusions and conclusory allegations do not receive that same treatment. *Virnich*, 664 F.3d at 212.

Facts

A severe wind and hail storm damaged the roof of a building owned by 70th Court Condo Association on May 20, 2014. [26] ¶ 8. The Condo Association filed an insurance claim with Ohio Security Insurance. [26] ¶ 9. Pursuant to their insurance policy, the parties participated in an appraisal. [26] ¶¶ 10, 26.

The appraisal process entails the following: each party selects a "competent and impartial" appraiser; the two appraisers select an umpire; each appraiser reports the value of the property and the amount of the loss; if the appraisers' valuations differ, they submit their valuations to the umpire; and a decision by any two is binding. [27-1] at 9. For example, if appraiser A and the umpire agree that appraiser A's valuation is correct and that appraiser B's valuation is incorrect, then appraiser A's valuation is the one that binds the parties (even though appraiser B disagrees) and appraiser B's valuation has no effect on the parties.

The Condo Association selected Pablo Rossi of Nicky's Construction as its appraiser and Ohio Security selected Eric Youngblood of Syndicate Claims and Services. [27-1] at 19. As part of the claims process, Ohio Security retained Donan Engineering. [26] ¶ 10. Donan Engineering inspected the roof in June 2014 and opined that "[l]ong-term, ongoing age-related deterioration is the primary distress

[2] The complaint refers to "an appraisal," [26] ¶ 26, and to the insurance policy, which was also attached to the original complaint. [26] ¶ 4; *see also* [26-1]. The appraisal and the insurance policy's appraisal clause are central to both the breach of contract claim and to the statutory claim under § 155 of the Illinois Insurance Code. Accordingly, the following documents that Ohio Security attached to its motion to dismiss will be considered: correspondence confirming the Condo Association's request for an appraisal; the Condo Association's appraiser's estimate of damage for the umpire's consideration; the umpire's report of findings; the appraisal award; correspondence confirming that Ohio Security sent the Condo Association payment owed per the appraisal award; and the insurance policy, including the appraisal clause. The Condo Association does not object to the court's consideration of these documents.

to the building's roof," and that wind did not damage the roof. [26] ¶¶ 11, 12, 16. Donan Engineering reached this conclusion without taking core samples from the roof. [26] ¶ 17.

The appraisers chose David Day of Miller Public Adjusters as the umpire. [27-1] at 22. In a report, the umpire noted that the Condo Association had filed a previous claim for roof damage caused by hail on January 28, 2013. [27-1] at 20. When the umpire inspected the roof, he noted damage to the roof that was consistent with findings from the hail event in 2013 as well as from the storm in 2014. [27-1] at 20. With respect to the damage caused in 2014, the Condo Association's appraiser proposed replacing the roof, attached fixtures, gutters and downspouts for $228,724.20; Ohio Security's appraiser proposed repairs to the roof, skylights, and air conditioning condensers for $2,999.94. [27-1] at 20.

The umpire held a discussion and allowed each party the opportunity to explain their position and findings. [27-1] at 20. Then, the umpire inspected the roof and observed "very few new fractures" to the roof. *Id.* In relevant part, the umpire concluded: "[d]amages to the roof appear to be repairable and do not warrant complete replacement of the roof. Since the [sic] most of the fractures did not penetrate the membrane, standard repair would be to perform minor repair remedies such as hot tar patch or seal coating of impacted areas." [27-1] at 21. Therefore, the umpire determined the actual cash value of the claim was $11,648.48 of which $1,503.39 was recoverable. [27-1] at 22. Ohio Security paid the Condo Association as directed by the appraisal award and the insurance policy. [27-1] at 26.

Almost one year after the umpire published the appraisal award, the Condo Association engaged Premier Public Adjusters to assist in reopening its claim. [26] ¶ 18. On May 4 and 10, 2016, Premier inspected the extent of damage to the roof. Premier concluded from its core sampling that the hail storm caused extensive damage to the roof. [26] ¶ 19. Shortly thereafter, Premier informed Ohio Security through Donan Engineering that Premier had new video and photographic evidence of the hail and wind damage that Donan Engineering had "failed to discover." [26] ¶ 22. Ohio Security responded to Premier through Donan Engineering that they did not wish to review the new evidence because the Condo Association's claim for roof damage was closed. [26] ¶ 23. On May 11, 2016, Premier emailed the video and photographic evidence to Donan Engineering; Ohio Security did not review Premier's evidence. [26] ¶ 27.

On June 23, 2016, the Condo Association "and or" Premier hired Carroll Structure Investigations, LLC to inspect the roof. [26] ¶ 28. Through core sampling, Carroll concluded that hail had damaged the roof, which Donan Engineering failed to observe. *Id.*

Ohio Security's Motion to Dismiss

Ohio Security argues that Counts I and II are time barred because the insurance policy requires that a legal action commence within two years after the date of damage. The storm that damaged the Condo Association's building occurred on May 20, 2014, but the Condo Association did not file this lawsuit until July 1, 2016, which was over one month too late. [1] ¶ 1. I previously explained that granting motions to dismiss based on affirmative defenses, such as the running of a policy's time limitation, is discouraged. *See United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). Arguments by the Condo Association that the policy limitation should be equitably tolled under § 143.1 of the Illinois Insurance Code, *see* 215 ILCS 5/143.1, and that Ohio Security waived its reliance on the time limitation or should be estopped from so relying make it inappropriate to grant the motion to dismiss on the affirmative defense about a two-year time limitation. As I previously explained, there are no allegations in the complaint about whether a proof of loss was requested or submitted, or whether the parties communicated about the two-year time limitation; thus, the applicability of tolling and waiver cannot be resolved at this stage. Documents or testimony that Ohio Security relies upon to show that no tolling or estoppel saves the timeliness of the breach of contract claim are not appropriate for consideration at this stage of the case.

But Ohio Security is correct that Count I must be dismissed because the Condo Association cannot support a cause of action for breach of contract. The Condo Association has not changed its theory underlying its breach of contract claim, nor has it added any new supporting facts that resolve the deficiencies in its original complaint. I dismissed a similar Count I because the Condo Association had no damages to claim after Ohio Security paid the Condo Association the amount owed under the appraisal award. *See* [22] at 13. The appraisal award was binding on the parties because the appraisal clause in the insurance policy was sufficiently clear and unambiguous, and the appraisal award was due substantial deference as there was no allegation of misconduct, gross error, or fraud.

The first amended complaint attempts to plead that the appraisal award is owed no deference and should be set aside. The Condo Association has labeled the video and photographic evidence that Premier collected after the appraisal award, which Ohio Security refused to consider, as "evidence of missed damage." [26] ¶ 26. According to the Condo Association, Ohio Security had a contractual duty and a public policy duty to reopen the claim for roof damage given the evidence of missed damage. [26] ¶¶ 33–34. The Condo Association argues that because Donan Engineering did not discover the damage (because it failed to take core samples of the roof), the damage was unknown to Ohio Security, which prevented Ohio

Security from considering it; therefore, "the missed damage should have been adjusted in a reopened claim." *Id.*

The allegations do not support a finding that damage from the May 20, 2014 storm was "missed." The umpire's report states that both parties submitted claim documents, both parties met the umpire at the site to discuss their positions and findings, and that the umpire performed his own inspection of the site. It also summarizes each party's estimate and proposal, including the Condo Association's proposal to "replace the roof, and attached fixtures and gutters/downspouts [. . .] for $228,724.20." [27-1] at 20. From those descriptions, it is clear that the umpire considered evidence presented by both sides. Yet, the umpire found the damage to the roof to be "repairable" and not significant enough to "warrant complete replacement of the roof." *Id.* The umpire specifically acknowledged the Condo Association's proposal and rejected it in favor of Ohio Security's proposal. That is an acceptable result in an appraisal.

The Condo Association says Donan Engineering's failure to take core samples of the roof was "gross error." [26] ¶ 22. As I explained in the last opinion, "[a]n award will not be set aside due to gross errors in judgment in law or gross mistakes of fact *by the arbitrator* unless the errors or mistakes are apparent on the face of the award." *Hayes v. Ennis*, 278 Ill.App.3d 121, 127 (1996) (emphasis added). The face of the award does not mention "Donan Engineering" or "core sampling"; the face of the award simply presents a breakdown of the replacement costs, the actual cash value, the date, and two signatures (Youngblood's and Day's). [27-1] at 24. Even if it were clear from the face of the award that Donan Engineering did not perform core sampling, it is not clear that the umpire erred. An expert's decision to use one method to assess damage to the exclusion of another method is something courts typically defer to, not something courts assign as error, let alone gross error. There is no evidence here that core sampling is an industry standard or that neglecting to assess damage by that method is unusual or problematic. *See* [22] at 12. Given that no misconduct, gross error, or fraud is found on the face of the appraisal award, I decline to set it aside.

As a result, the Condo Association has no damages and cannot state a claim for breach of contract. Ohio Security's motion to dismiss Count I is granted.

Ohio Security also moves to dismiss Count II, arguing that the allegations are conclusory and do not state a claim under § 155 of the Illinois Insurance Code. Although paragraph forty-seven in the first amended complaint is an almost verbatim copy of relevant statutory language, *see* 215 ILCS 5/154.6, I do not find that the allegations under Count II, as a whole, are conclusory. Rather, Count II is dismissed because the Condo Association is not entitled to relief under the statute. "[A]n insurer's conduct is not vexatious and unreasonable if: (1) there is a bona fide

dispute concerning the scope and application of insurance coverage; (2) the insurer asserts a legitimate policy defense; (3) the claim presents a genuine legal or factual issue regarding coverage; or (4) the insurer takes a reasonable legal position on an unsettled issue of law." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000). The allegations of the complaint (and the documents central to its claims) make clear that the parties had a bona fide dispute concerning the application of the binding appraisal award, and that Ohio Security asserted a legitimate policy defense to reopening the claim when it paid the Condo Association as directed under the appraisal award. Count II is dismissed because it does not state a claim for relief.

Donan Engineering's Motion to Dismiss

Donan Engineering moves to dismiss Count III arguing that it owes no duty to the Condo Association and that even if it did, the economic loss doctrine precludes the Condo Association from recovering purely economic losses under a negligence theory. I disagree with both assertions.

A duty arises where the parties are "in such a relationship to each other that the law impose[s] upon [one] an obligation of reasonable conduct for the benefit of [the other]." *Happel v. Wal-Mart Stores, Inc.*, 199 Ill.2d 179, 186 (2002). Whether a duty exists is a question of law. *Chandler v. Illinois Cent. R.R.*, 207 Ill.2d 331, 340 (2003). To determine whether a duty exists, courts consider factors, including: "(1) the reasonable foreseeability that the defendant's conduct may injure another, (2) the likelihood of an injury occurring, (3) the magnitude of the burden of guarding against such injury, and (4) the consequences of placing that burden on the defendant." *Happel*, 199 Ill.2d at 186–87.

On behalf of Ohio Security, Donan Engineering inspected the Condo Association's roof for wind and hail damage. Taking all of the Condo Association's allegations as true and construing all reasonable inferences in its favor, it is plausible that Ohio Security used Donan Engineering's inspection and findings in preparation for the appraisal process and that the umpire relied on Donan Engineering's findings in deciding the amount of the appraisal award.[3]

[3] Donan Engineering conducted its study of the roof on June 20, 2014, and it "published its opinion" on June 25, 2014. [26] ¶ 11. Both dates occurred before the inspection and discussion with the umpire (and before the umpire published the appraisal award). *See* [27-1] at 20. Also, the first amended complaint refers to "damage observed by Donan Engineering during the appraisal process," [26] ¶¶ 33–34, and it alleges that: "Donan Engineering's gross error resulted in the Umpire committing a gross error of fact because the Umpire and appraiser that voted in favor of the appraisal award did so in reliance on Donan Engineering's grossly incompetent report." [26] ¶ 54.

Under these circumstances, the four factors weigh in favor of the Condo Association: (1) it was reasonably foreseeable to Donan Engineering that a negligent inspection of the roof could be selected by the umpire as the basis for the appraisal award, which would injure the Condo Association; (2) it was likely that a negligent inspection that did not detect hail damage to the roof would result in a lower appraisal being considered by the umpire, which would injure the Condo Association; (3) the burden of conducting a competent roof inspection is small; and (4) placing the burden on Donan Engineering would not be unduly burdensome. Therefore, Donan Engineering not only owed a contractual duty to Ohio Security, but also, it owed a separate duty to the Condo Association—a duty to perform a reasonable inspection of the roof.[4] While some factual development might belie the Condo Association's theory of a duty owed to it by Donan Engineering, the allegations of the complaint state a claim.

Purely economic losses are not recoverable under traditional tort theories, such as negligence, under the economic loss doctrine.[5] *Moorman Mfg. Co. v. Nat'l Tank Company*, 91 Ill.2d. 69, 90–91 (1982). This doctrine is subject to many exceptions, however. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 567–68 (7th Cir. 2012). What the exceptions all share in common is the existence of a duty that arises outside of the contract. *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 693 (7th Cir. 2011) ("These exceptions have in common the existence of an extra-contractual duty between the parties, giving rise to a cause of action in tort separate from one based on the contract itself.") This case falls squarely within the exception to the economic loss doctrine. Donan Engineering owed the Condo Association an extra-contractual duty to perform a reasonable inspection of the roof for the appraisal.

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[4] An agent can be held liable in tort to a third party where the agent's conduct breaches an independent duty that it owes to the third party. *Schur v. L.A. Weight Loss Ctrs. Inc.*, 577 F.3d 752, 765 (7th Cir. 2009) ("A person is not absolved of personal liability to a third person on account of his or her negligence or other wrongful act merely because at the time such person was acting as an employee within the scope of the employment.") (citation omitted).

[5] The Illinois Supreme Court has also held that the economic loss doctrine bars recovery in tort against engineers for purely economic losses. *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 176 Ill.2d 160, 168 (1997). This rule is based on a premise that the engineer contracted with the party for whom it engineered something. *Id.* at 167. That is not the case here. Donan Engineering had no contract with the Condo Association, nor did it engineer anything for the Condo Association. The rule should not apply here, where Donan Engineering operated as a mere inspector, not an engineer of plans or of things.

Whether or not Donan Engineering breached the duty it owed the Condo Association and whether it is liable under a negligence theory remains to be seen. Donan Engineering's motion to dismiss Count III is denied.

ENTER:

Date: 3/17/2017

Manish S. Shah
U.S. District Judge