

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES BISWANGER IV,
Plaintiff,
v.
STARR SURPLUS LINES
INSURANCE COMPANY,
Defendant.

Case No. 18-cv-04005-NC

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS**

Defendant Starr moves to dismiss Plaintiff Biswanger’s three claims which arise out of a trial court judgment against Denison, Starr’s insured and Biswanger’s former employer. The judgment follows personal injuries sustained by Biswanger involving hot roofing tar while Biswanger was working for Denison as a roofing contractor. The question presented in the motion to dismiss is whether Biswanger has alleged facts to state a facially plausible claim for relief. *See* Fed. R. Civ. P. 8(a). The Court finds that Biswanger has done so. Therefore, Starr’s Motion to Dismiss is DENIED.

I. BACKGROUND

A. Factual Allegations

The following facts are alleged in Biswanger’s complaint. *See* Dkt. No. 1. In deciding this motion, the Court assumes these allegations to be true and construes all facts in Biswanger’s favor. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996).

1 On March 2, 2015, Biswanger suffered severe burns from spilled roofing tar while
2 working as a roofing contractor. *See* Dkt. No. 1 at 4. He required medical treatment of
3 significant expense. *Id.* On March 27, 2015, Biswanger filed a lawsuit against his
4 employer, Denison, for personal injury and damages. *Id.* Starr was Denison’s liability
5 insurer. *Id.* Starr hired the law firm of Wood Smith to defend Denison. *Id.*

6 During discovery, in June 2015, Wood Smith responded to an interrogatory stating
7 that Denison’s liability insurance coverage was limited to \$1,000,000 per accident. *Id.* at
8 5. In March 2016, Biswanger offered to settle for \$1,000,000 under CCP § 998. *Id.* The
9 offer expired without Denison’s acceptance. *Id.* In July 2016, Wood Smith informed
10 Denison that Starr would no longer fund its representation of him; soon after, Wood Smith
11 withdrew as Denison’s counsel in the case. *Id.* at 6. This occurred because of a “Torch
12 Down Or Hot Tar Roofing Sub-Limit” within Denison’s Starr insurance policy which
13 capped tar-related accident coverage at \$100,000. *Id.*; *see also* Dkt. No. 10 at 8. This
14 \$100,000 sublimit included defense costs and fees. *Id.* at 5. The \$100,000 had already
15 been spent on Wood Smith’s services. *Id.* at 6.

16 After mediation was concluded, Starr amended its earlier interrogatory response
17 regarding the limit of its liability coverage to indicate the \$100,000 sublimit for claims
18 involving tar. *Id.* At that time Starr also informed Biswanger that the sublimit had been
19 exhausted on defense costs. *Id.* Therefore, no funds were available under the policy for
20 Biswanger. *Id.* Denison hired new counsel to represent him against Biswanger at trial,
21 where in December 2017 a judgment was rendered in Biswanger’s favor for \$789,000. *Id.*;
22 *see also* Dkt. No. 1, Exhibit 2, at 1–5. Biswanger seeks to enforce that judgment. Dkt. No.
23 15 at 1.

24 Biswanger alleges that Starr misrepresented its coverage limit, leading him to
25 believe that the limit was \$1,000,000 rather than \$100,000. *See* Dkt. No. 1 at 5. Further,
26 neither Starr nor Wood Smith informed Biswanger that defense costs and fees would be
27 deducted from that total. *Id.* Rather, Starr and Wood Smith represented that the
28 \$1,000,000 limit was “available, unrestricted, to pay for any settlement or judgment

1 resulting from his claim against Denison.” *Id.* Biswanger could have made a settlement
2 offer or policy limit demand for \$100,000 under CCP § 998 had he not been misled. *Id.*

3 **B. Procedural History**

4 Biswanger filed his complaint against Starr in July 2018. *See* Dkt. No. 1.
5 Biswanger alleges three counts: (1) direct action by judgment creditor under Cal. Ins. Code
6 § 10580(b)(2); (2) breach of contract by assignment; and (3) breach of implied covenant of
7 good faith and fair dealing owed to judgment creditor. Starr moved to dismiss all three
8 counts in Biswanger’s complaint. *See* Dkt. No. 10. All parties consented to the
9 jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 5 & 14.

10 **II. LEGAL STANDARD**

11 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
12 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
13 motion to dismiss, all allegations of material fact are taken as true and construed in the
14 light most favorable to the non-movant. *Cahill*, 80 F.3d at 337–38. The Court, however,
15 need not accept as true “allegations that are merely conclusory, unwarranted deductions of
16 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th
17 Cir. 2008). Although a complaint need not allege detailed factual allegations, it must
18 contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible
19 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially
20 plausible when it “allows the court to draw the reasonable inference that the defendant is
21 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

22 **III. DISCUSSION**

23 The question presented on this motion to dismiss is whether Biswanger’s complaint
24 states a facially plausible claim under Fed. R. Civ. P. 8(a). In this case that question turns
25 on the issue of whether Starr may be held responsible for the misrepresentations made to
26 Biswanger regarding the policy limit.

27 Under California law, an insurer has a duty to appoint competent counsel to defend
28 its insured. *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 880–882 (1973). This duty

1 does not render the insurer liable for those appointed lawyers' mistakes or negligence in
 2 the course of that representation. *Id.* Insurers are prohibited from appearing in California
 3 courts and have no authority to do so. *Id.* Counsel appointed by insurers are considered
 4 independent contractors rather than employees, and therefore no agency relationship nor
 5 vicarious liability exists. *Id.*; *see also Otten v. San Francisco Hotel Etc. Assn.*, 74 Cal.
 6 App. 2d 341, 343 (1946); *see also* 1 Witkin, Calif. Prac., 2d ed., "Attorneys," § 24, p. 33.
 7 In short, this representation is a delegable duty. *Merritt*, 34 Cal. App. 3d at 880.

8 Though insurers are not liable for the negligence or even malpractice of appointed
 9 counsel, insurers may nonetheless be liable for negligence in their own duties. *Merritt*, 34
 10 Cal. App. 3d at 882. These may include, for example, investigating accidents, employing
 11 competent counsel to represent their insured, and acting "intelligently and in good faith on
 12 settlement offers." *Id.* Meanwhile, the appointed counsel is responsible for "the conduct
 13 of the actual litigation, including the amount and extent of discovery, the interrogation,
 14 evaluation, and selection of witnesses, the employment of experts, and the presentation of
 15 the defense in court." *Id.* Insurers, however, still maintain liability for their own duties.
 16 *Id.* Representations made during settlement negotiations may be one such duty.¹ *Id.*

17 Here, Biswanger has alleged sufficient facts to plausibly claim that Starr is liable for
 18 the misrepresentations made about the policy limit. The complaint alleges that in response
 19 to an interrogatory dated June 19, 2015, Denison stated that his Starr insurance coverage
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21 ¹ In *Merritt*, the Court stated that "Reserve [the insurer], of course, remains liable for the
 22 negligent performance of its own duties. Under the policy Reserve assumed three principal
 23 duties in relation to the assured: (1) to make immediate inquiry into the facts of any serious
 24 accident as soon as practicable after its occurrence; (2) on the filing of suit against its
 25 assured to employ competent counsel to represent the assured and to provide counsel with
 26 adequate funds to conduct the defense of the suit; (3) *to keep abreast of the progress and*
 27 *status of the litigation in order that it may act intelligently and in good faith on settlement*
 28 *offers."* *Merritt*, 34 Cal. App. 3d at 882 (emphasis added). Other courts – including in this
 District – have construed the list of insurer duties from *Merritt* as applicable generally to
 insurers during litigation, rather than to Reserve and its policy in particular. *See Bostick v.*
Atl. Mut. Ins. Co., No. 04-cv-09210 VBF, 2008 WL 113362, at *3 (C.D. Cal. Oct. 21,
 2008); *see also Ghiglione v. Discover Prop. and Cas. Co.*, No. 06-cv-01276 SC, 2007 WL
 963250, at *2 (N.D. Cal. Mar. 29, 2007). Here, construing all facts in Biswanger's favor,
 the Court assumes as the Complaint alleges that the Starr policy in this case required the
 insurer to act in good faith on settlement offers.

1 was limited to \$1,000,000 per accident. Dkt. No. 1 at 5. The complaint further describes
 2 that “[p]laintiff was led all along to believe *by STARR and its appointed counsel* that the
 3 liability insurance limits of the STARR Policy available to resolve the Biswanger Lawsuit
 4 were \$1,000,000.” *Id.* (emphasis added). It was not until mediation on July 19, 2016 that
 5 Denison himself was made aware of the \$100,000 limit. *Id.* After mediation concluded,
 6 Starr amended its interrogatory response from the year prior to represent both the existence
 7 and exhaustion of the \$100,000 hot tar sublimit. *Id.* at 6. Biswanger alleges that not only
 8 did Starr misrepresent its coverage to him, but that it also misrepresented its coverage to
 9 Denison, who was “surprised, shocked and concerned once he learned this.” *Id.*

10 This conduct does not clearly fall within the delegated duties of appointed counsel,
 11 which is limited to “the conduct of the actual litigation.” *Merritt*, 34 Cal. App. 3d at 882.
 12 Rather, the facts in the complaint are sufficient to allege that Starr failed in its own duties,
 13 beyond any mistakes made by Wood Smith. *See* Dkt. No. 1. Biswanger alleges that not
 14 only did Wood Smith misrepresent the policy limit, Starr did so as well. *Id.* The
 15 complaint alleges that the policy included a “covenant that STARR will act in good faith
 16 and fairly deal with its insureds, and that it will do nothing to interfere with its insureds’
 17 rights to receive the benefits of the Policy . . . and will properly and objectively fulfill its
 18 duties to its insureds under the Policy.” Dkt. No. 1 at 8; *see also Merritt*, 34 Cal. App. 3d
 19 at 882. Biswanger plausibly pleads that Starr violated that duty. *See* Dkt. No. 1.

20 **IV. CONCLUSION**

21 At the pleading stage, Biswanger must only plead facts that allow this Court to draw
 22 a reasonable inference that Starr is liable for the misconduct alleged. *Iqbal*, 556 U.S. at
 23 678. Here, Biswanger has done so. Therefore, Starr’s Motion to Dismiss is DENIED.

24
 25 **IT IS SO ORDERED**

26
 27 Dated: September 28, 2018



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 NATHANAEL M. COUSINS
 United States Magistrate Judge