Docket No. 14-15975

In the

United States Court of Appeals

For the

Ninth Circuit

BECKY MCVAY,

Plaintiff-Appellant,

v.

ALLIED WORLD ASSURANCE COMPANY, INC. and
YORK RISK SERVICES GROUP, INC.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Nevada,
No. 3:13-cv-00359-HDM-WGC · Honorable Howard D. McKibben

REPLY BRIEF OF APPELLANT

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INTRODUCTION

At the outset, it is important to remember that this case involves a unique factual scenario that is unlike other cases involving claims against an insurance company for bad faith, breach of contract, and for breach of the covenant of good faith and fair dealing. First, it is unique because is set against the legislative backdrop of Federal Indian Law and involves an injury that occurred at a business, Fox Peak Station, operated pursuant to a Corporate Charter by the Fallon Tribal Development Corporation, and owned by a Federally recognized Indian Tribe, The Fallon Paiute Shoshone Tribe ("the Tribe"), off reservation property. That Federal law, when viewed as a cohesive statutory scheme, sets forth the laudable policy goal of allowing tribes more self-determination and economic freedom to engage in commerce. However, to protect tribal treasuries, it also requires such tribes to carry insurance designed to protect patrons of tribal businesses and those that interact with the tribe that are specifically not protected under the Federal Torts Claims Act.

Second, it is different because the insurance policy, which covers businesses like the one where Appellant Becky McVay ("McVay") was injured, that serve the important purpose of funding the tribe's government, are meant to protect those persons that frequent the tribe's businesses. The protections provided to McVay are not only mandated by Federal law, but also recognized in the Tribe's Charter,

which is signed by the Secretary of the Interior, and set forth in the Program for Sovereign Indian Nations General Liability Policy ("the Policy"), which makes McVay a specific intended beneficiary to the Policy. To determine otherwise renders the Policy invalid because with the Tribe's sovereign immunity status, there is no other insurable interest than to provide payment to third parties injured on insured premises. The contract at issue defines the "named insured" to include persons to whom the tribe has promised to maintain insurance coverage and who suffer personal injuries on the premises. The Fallon Paiute Shoshone Tribe promised the world in its published corporate charter to maintain insurance at Fox Peak Station, and Mrs. McVay suffered a personal injury there. If persons like McVay are not the intended beneficiaries of the Policy, then the only one who benefits from the contract for insurance are the Appellees, since they collect premiums for a liability risk that simply does not exist, and for which they never have to payout on claims. Surely this result countervenes the intention and the spirit of any Policy for insurance. Under Nevada law, this constitutes the epitome of bad faith.

Moreover, in their Answering Brief, Appellees made much of the fact that neither Federal legislation nor the Tribe's Charter could provide the basis for coverage under the Policy. While McVay disagrees with these contentions, as addressed below, it is also important to understand that even if federal law and the

Charter do not provide a basis for McVay's claims that does not mean that such an agreement does not exist. For that reason, the District Court erred when it implied that it was McVay's burden to demonstrate facts or point to a provision of the Policy provided by Appellees, to show that McVay was a third-party beneficiary on a Motion to Dismiss, before discovery had even been conducted. Moreover, to the extent McVay was required to demonstrate such facts, then she should have been allowed to amend her Complaint.

In so doing, the District Court went well beyond the liberal standard of a Motion to Dismiss under Rule 12(b)(6) by considering the Policy submitted by Appellees with their Motion to Dismiss, as well as a declaration submitted by Appellees, and then requiring McVay to set forth facts in her Complaint that could not be known in the absence of discovery. As a result, the District Court here essentially rendered the Motion to Dismiss a Motion for Summary Judgment, without providing McVay the opportunity to conduct discovery to determine if there was any other evidence that demonstrated she was a third-party or specific intended beneficiary under this Policy or any other Policy of the Tribe—which is a plausible claim in this case. *Intermedics, Inc. v. Ventritex, Inc.*, 775 F.Supp. 1258, 1261 (N.D.Cal. 1991). ("Facts properly held the object of judicial notice in the context of a motion to dismiss under 12(b)(6) include, among others, records and reports of administrative bodies, *Interstate Natural Gas Co., v. Southern California*

Gas Co., 209 F.2d 380, 385 (9th Cir.1953), items in the record of the case or matters of general public record, *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C.Cir.1979), and copies of a document (i.e. a contract) attached to the complaint as an exhibit. *Case v. State Farm Mutual Automobile Insurance Company*, 294 F.2d 676 (5th Cir.1961)").[1]

As McVay noted in her Opening Brief at footnote 6, page 17, McVay has not had any opportunity to propound discovery to determine why this particular

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[1]McVay recognizes that she requested this Court to take judicial notice of the FTDC's Corporate Charter, the FTCA's rejection of her claim, and the Tribal Court's Order in her Opening Brief at 6-9, fns. 1-3. These documents fall within the scope of strict notice and are therefore permissible for consideration by the District Court. Moreover, it is important to note that McVay does not take issue with the District Court considering the Policy—instead, McVay takes issue with the District Court's implication that McVay should essentially prove up the claims in her Complaint without being afforded the opportunity to conduct discovery. This is not in accord with the standard of review on a motion to dismiss which only requires that "factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),[3] on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz v. *556 Sorema N. A.,* 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (**a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely**") *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

Policy covers the Tribe's off-reservation business enterprise, or even whether this is the only policy of coverage in place for that location. In the Complaint, McVay alleged that there is an agreement between the Tribe and very likely the Federal government or an agency thereof that requires insurance coverage for the sake of third-parties injured on tribal property, and to promote the Tribe's ability to compete economically with non-tribal entities. If such an agreement exists, which can only be determined through discovery, Appellees claims that McVay is not a third-party beneficiary fail. As a result, McVay's Complaint was sufficient to overcome a Motion to Dismiss. Thus, the District Court's Order granting dismissal must be reversed.

ARGUMENT

I. NOTWITHSTANDING APPELLEES CLAIMS TO THE CONTRARY, FEDERAL LAW REQUIRES TRIBES TO AGREE TO CARRY INSURANCE POLICIES LIKE THE ONE AT ISSUE HERE BEFORE THEY ARE ELIGIBLE TO CARRY OUT SELF-DETERMINATION CONTRACTS.

In the Answering Briefs, Appellees maintain that Indian Self-Determination Assistance Act, 25 U.S.C. § 450f *et. seq.,* does not require tribes to purchase insurance to activities that go beyond the scope of self-determination contracts. In making their argument, Appellees correctly state that Congress wanted to limit the liability of the tribes that agreed to participate in self-determination contracts, as a means of achieving greater self-governance and independence. As the plain language of the statute demonstrates, Congress did this in the following two ways.

First, as Appellees point on in their Answering Brief at page 13, Congress agreed that the United States would subject itself to law suits arising under the Federal Torts Claims Act.

Second, it determined that the Secretary of the Interior would obtain liability insurance for any tribes that carried out such contracts. Notably, and contrary to Appellees' position otherwise, it did not limit the scope of the coverage only to tribal activities carried out under the Act. The statute simply requires insurance coverage for tribes who carry out self-determination contracts. In fact, Appellees' own discussion of the Policy in question belies this fact, despite their protests to the contrary. In their brief at page 9, Appellees admit that the Policy in question covers both services that are carried out pursuant to self-determination contracts and activities like the ones carried out at Fox Peak Station. Thus, McVay is correct in stating that the Policy in question was obtained pursuant to §450f because, as Appellees admit, it covers activities that are carried out pursuant to self-determination contracts.

This is precisely what was intended under the statute. In fact, as McVay already pointed out in her Opening Brief, the Secretary of the Interior was specifically instructed to consider "the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act," when obtaining insurance coverage. This language plainly indicates that any insurance

coverage obtained under section 450f should apply to acts that fall outside the scope of coverage of the FTCA, precisely because the United States Government would pay only claims made under the FTCA.

In addition, none of the cases cited by Appellees stand for the proposition that the requirement to purchase insurance under §450f is only limited to liability for self-determination contracts—which would be covered under the FTCA. *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) and *Demontiney v. United States*, 255 F.3d 801 (9th Cir. 2001) are both cases that address whether acts carried out by the Bureau of Indian Affairs fall within the scope of the IDSEAA such that the United States would be liable under the FTCA. Likewise, *Goodhunter v. Na 'Nizhoozi Ctr.,* No. WL 865870, at *2 (D. N.M. Dec. 1, 1995) and *Wooten v. Hudson*, 71 Supp. 2 1149 (E.D. Okla. 1999) also concern whether claims are appropriate under the FTCA. None of these cases deal with the scope of the insurance required under §450f. They are especially unhelpful here, where McVay has already plainly stated that she is not bringing her claims against Appellees pursuant to the FTCA, and the Federal government has denied coverage because the claim are outside the scope of the FTCA.

Finally, nothing in the legislative history cited by Appellees contradicts such a reading of §450f. Instead, it supports McVay's argument that the scope of the insurance requirement set forth in §450f is broader because costs would only

increase if the United States purchased insurance to cover tribes for liability already covered by the FTCA. In fact, as noted by the Hon. Daniel K. Inouye in his Statement on Senate Report No. 100-274, "[i]f these tribal organizations were covered under the Federal Torts Claims Act, the federal government **would not actually have to purchase insurance for the tribes**." (emphasis added). In fact, part of the reason that Congress expanded the scope of the FTCA was "to protect the tribes from the costs of buying expensive liability insurance when it extended the FTCA to cover the tribes' torts." Joseph W. Gross, *Help Me Help You: Why Congress's Attempt to Cover Torts Committed by Indian Tribal Contractors with the FTCA Hurts the Government and the* Tribes, 362 Am. U. L. Rev. 383, 440 (2012). As a result, it appears from the legislative history Appellee cited that any liability insurance purchased pursuant to the guidance of §450f(c)(1) is to cover claims not protected under the FTCA—claims like McVays.[2]

[2]Because the Policy at issue clearly contains provisions that apply to both self-determination contracts and other activities, it is unclear whether this policy was purchased by the Tribe or by the federal government or whether there are additional insurance policies carried by the Tribe that cover McVay and/or cover the tribes self-determination activities. This is yet another area that should be fleshed out by permitting McVay to conduct discovery below.

II. MCVAY IS A THIRD PARTY BENEFICIARY AND/OR A SPECIFIC BENEFICIARY OF THE FTDC'S POLICY

a. McVay is a Third-Party Beneficiary.

Appellees' arguments that McVay is not a third-party beneficiary to the Policy at issue here are unavailing, especially when considering a Motion to Dismiss. Under Nevada law, a contractual relationship with an insurer is required to assert a claim of bad faith refusal to settle a claim, unless a third party is a specific intended beneficiary to the insurance contract. *Vignola v. Gilman*, 804 F.Supp.2d 1072 (Nev. 2011). Here, McVay has alleged that she is such a beneficiary pursuant to agreements made under §450f and pursuant to the FTDC's Charter.

Appellees contention that the there is not an agreement to purchase insurance under §450f because a statute is not a contractual agreement misconstrues McVay's argument. Here, the contract that forms the basis of the coverage is not the statute itself, but agreements made pursuant to the statute that require the Tribe to purchase liability insurance in exchange for being allowed to carry out self-determination contracts. Because Appellees admit that the Tribe does participate in such activities, it is clear that such an agreement does exist. Problematically, however, because the District Court granted Appellees' Motion to Dismiss prematurely, without permitting her to conduct discovery, it is simply impossible and unjust to require McVay to demonstrate those facts—and they are

not required to overcome a Motion to Dismiss, which should be determined on the basis of McVay's Complaint alone.

In addition, the FTDC's Charter does provide a contractual basis for coverage to Plaintiffs like McVay. In that Charter, the Tribe agreed to procure insurance to cover any liabilities that occur at FTDC's businesses. This is not a benefit that runs to the Tribe—who is already protected under the doctrine of sovereign immunity. Instead, it is a benefit that runs for third parties like McVay, who fund tribal treasuries by frequenting businesses run by the Tribe.

III. MCVAY IS A SPECIFIC INTENDED BENEFICIARY.

It is important to recognize that this case presents questions that are not easily addressed under Nevada contract principles. That is because an insurance contract to protect the actions of a sovereign nation is unique among insurance instruments, since the insurable interest is not obvious—rather it is often every complex. That is precisely why the "named insured" in this unique and extraordinarily broad Policy for coverage of personal injuries at Fox Peak Station is designed to include the persons who suffer personal injuries. Otherwise, the policy is nothing but snake oil. And, Appellees assertion that McVay's argument that the Policy is a sham is incorrect because the Policy provides "$2 million in aggregate limits for twelve broad types of coverage, for a minimal annual payment of $17,310," also rings hallow if Allied accepts premium payments for all of those

broad areas of coverage when they believe the risk of paying any claims is nil because the claims are either covered by the FTCA, or the rest are shielded from lawsuits under the doctrine of sovereign immunity.

In its Ansering brief, Allied at page 19 correctly state that the question of whether a person is a specific intended beneficiary "depends on the parties' intent, gleaned from reading the contract as a whole **in light of the circumstances under which it was entered**." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P. 3d 599, 605 (Nev. 2005). Here, reviewing this contract as a whole, in light of the circumstances under which it was entered, McVay is an intended beneficiary. Appellants claim that the Policy is purchased for the benefit of the tribe to protect themselves against potential liability. However, the Tribe is already protected under the doctrine of sovereign immunity. Thus, it appears that there is no insurable interest regarding the Policy in this case, as it relates to FTDC, since the Tribe is always insulated from suit and therefore, will never be liable for any injuries that occur at Fox Peak Station. Surely, it was not the intention of the FTDC to pay premiums on a Policy with no risk or insurable interest, which would be a Policy in contravention of public policy and void as a matter of law. 44 Am. Jur. 2d. Insurance §927 (2014). The only possible "insurable interest" has to be the statutory mandate and/or a requirement of the Tribe by contract, and for the benefit of persons injured at tribal businesses. Therefore, it is injured parties like McVay

who have a special relationship with the insurer, despite the arguments set forth by the Appellees. Despite this fact, Appellees are unapologetic in their refusal to address or entertain McVay's claims. Instead, they brazenly contend that McVay is without redress for her harm because their client is sovereign, and because McVay will never find a court to impose enough liability risk to change the way her claim is adjusted. Notably, both the Tribe and McVay lose under Appellees proposed legal analysis—which was surely not the intention of the Tribe, the FTDC or the Federal government. Instead, the Policy at issue here, which is a contract of adhesion, to which McVay is the specific intended beneficiary, should be interpreted broadly, affording the greatest possible coverage to McVay as the insured. *Farmers Ins. Group v. Stonik*, 110 Nev. 64, 867 P.2d 389 (1994); see also *Serrett v. Kimber*, 110 Nev. 486, 874 P.2d 747 (1994) (noting any ambiguity in an insurance policy will be construed against the insurer and in favor of the insured.III. the question of whether mcvay is a pre-judgment plaintiff is not dispositve here because McVay is a named and/or specific beneficiary under the policy and any determination otherwise, in the absence of more discovery, is not appropriate.

a. More Discovery is Needed to Determine Whether There Are Additional Agreements that render McVay a Third-party or Specific Intended Beneficiary Under Nevada Law.

Appellees contend that McVay has no standing because she has no judgment against the Tribe. As set forth above, McVay has standing in this case because she is a third-party beneficiary and a specific intended beneficiary pursuant to agreements made by the Tribe. McVay alleged this in her Complaint, to an extent sufficient to survive analysis under Rule 12. In this case, the District Court granted the Motion to Dismiss before McVay could even begin discovery to determine whether any additional agreements, besides those set forth in the arguments below, and before this Court, exist. As a result, McVay respectfully requests that this Court reverse the District Court's granting of the Motion to Dismiss, which in effect was really a Motion for Summary Judgment without the benefit of discovery, to flesh out the facts in this case. The facts alleged in the Complaint support the legal causes of action asserted therein, and withstand the Appellees' Motion to Dismiss.

b. The Question of Whether a Party Injured on the Premises of a Tribal Business, who is barred from Recovering Directly from the Tribe Under the Doctrine of Sovereign Immunity, Should be Required to Obtain a Judgment Is Not a Matter of Law That Has Been Decided in Nevada.

Appellees also argue that the Nevada Supreme Court has never recognized an exception to the bar against recovery by a prejudgment plaintiff. Allied's Answering Brief at 21-23; York's Answering Brief at 7-9. While Appellant

concedes that *Knittle v. Progressive Cas. Ins. Co.*, 908 P.2d 724, 726 (Nev. 1996) stands for the proposition that generally a plaintiff does not have a cause of action against an insurer unless plaintiff has demonstrated liability, McVay contends that that the Nevada Supreme Court has yet to address this question under the unique facts presented here—namely, when the insured is a tribal government immune from suit under the doctrine of sovereign immunity, and its insurer has failed to pay on her claim. For that reason, McVay respectfully requests that this Court certify the question to the Nevada Supreme Court, pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, to let that Court determine, under state law, if an exception should be made under these limited circumstances.

IV. APPELLEES HAVE BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING AND EXHIBITED BAD FAITH IN PROCESSING MCVAY'S CLAIM.

As noted above, a contractual relationship with an insurer is required to assert a claim of bad faith refusal to settle a claim, unless a third party is a specific intended beneficiary to the insurance contract. *Vignola v. Gilman*, 804 F.Supp.2d 1072 (Nev. 2011). In this case, McVay is a specific intended beneficiary to the insurance contract, as well as being a "named insured". Here, McVay set forth a claim in her Complaint sufficient to show that Appellees breached the covenant of good faith and fair dealing by refusing, without proper cause, to compensate, or even really consider the losses she suffered. *See Schumacher v. State Farm Fire &*

Cas. Co., 467 F.Supp.2d 1090 (D. Nev. 2006). For that reason, the District Court erred when it granted Appellees Motion to Dismiss.

Here, appellees also wrongly assert that they did not act inappropriately in asserting the defense of sovereign immunity in this case. In so arguing, Appellees contend that they were not required to follow the terms of their Policy with the Tribe. But the Policy plainly states that the company was not entitled to raise such a defense unless it was instructed to do so by the Tribe. Thus, in this respect, the Tribe already unequivocally and clearly waived the defense of sovereign immunity in the Policy, at least to limits of the insurance Policy, by accepting the requirement in the Policy that it would need to act affirmatively, and in writing, in order for Appellees to raise the defense. Therefore, Allied should have followed the requirements of the Policy, which are arguably required under §450f *et. seq.*, which requires all Tribes that receive self-determination to contracts to purchase insurance and waive liability to limits of those policies. This wrongful act cannot be undone simply by providing the Court with declaration of the Chairman of the Board of Directors, Jon Pishon, to show that the Tribe would have waived Sovereign Immunity, an extraeneous document that should not have been considered below without affording McVay the opportunity to conduct discovery concerning the sovereign immunity endorsement in the Policy, and whether the Policy was purchased under the IDSEAA, and that is why there is a waiver of

sovereign immunity in the Policy. As a result, this Court should reverse the District Court's order and remand this case for further proceedings below.

V. AMENDMENT OF THE COMPLAINT IS NOT FUTILE.

In their conclusion, Appellees both argue that the District Court correctly concluded that a motion to amend would be futile. This is simply not the case. Even if the Court found that the Complaint fails Rule12 analysis, her allegations may be reformed or restated.

CONCLUSION

Under Nevada law, McVay has standing to sue the insurer and its servicer in this case. McVay's claims, as set forth in the Complaint, survive Rule 12(b)(6) analysis, and any alleged facts deemed insufficient are certainly amenable to an effective amendment of the complaint. The lower court's decision must be reversed, and the Appellees required to file an answer to McVay's complaint.

DATED: November 10, 2014

Respectfully submitted,

By: s/ La Donna J. Childress
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By: s/ Nicole Harvey
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Attorneys for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 3,962 words.

DATED: November 10, 2014

Respectfully submitted,

By: s/ La Donna J. Childress
LA DONNA J. CHILDRESS

By: s/ Nicole Harvey
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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent