

No. 861158

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TULALIP TRIBES OF WASHINGTON, federally
recognized Indian Tribes, and TULALIP
GAMING ORGANIZATION, an instrumentality
and enterprise of Tulalip Tribes of Washington

Appellants,

v.

LEXINGTON INSURANCE COMPANY, et al.,

Respondents.

**RESPONDENTS ALLIANT SPECIALTY INSURANCE
SERVICES, INC.'S AND ALLIANT SPECIALTY
SERVICES, INC., d/b/a TRIBAL FIRST'S RESPONSE
BRIEF**

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I. INTRODUCTION

The relevant operative pleading seeks insurance coverage for business losses ensuing from a series of tribal orders made in an effort to slow the transmission of COVID-19. The Respondent Insurers successfully argued to the trial court that under binding Washington Supreme Court precedent, such allegations do not constitute the “physical loss to property” required to trigger the pertinent insurance policies. *Hill & Stout, PLLC v. Mut. Of Enumclaw Ins. Co.*, 200 Wash. 2d 208, 220, 515 P.3d 525, 532 (2022) (en banc).

Respondents Alliant Specialty Insurance Services, Inc. and Alliant Specialty Insurance Services, Inc. d/b/a Tribal First (collectively, “Alliant”) are erroneously alleged to be insurers. Note that Alliant vigorously denies that it is an insurer. Regardless, Alliant respectfully request that this Court uphold the trial court’s dismissal of all of Tulalip Tribes of Washington and Tulalip Gaming Organizations’ (collectively, “Tulalip”)

claims against Alliant because if Alliant is an insurer (as alleged by Tulalip), then all claims against Alliant should be dismissed.

Alliant refers this Court to the Respondent Insurers' brief expected to be filed May 3, 2024, to better understand the insurers arguments. In short, Lexington Insurance Company's Motion to Dismiss Third Amended Complaint (CP 885-923) was granted, and Tulalip's claims against Lexington were dismissed with prejudice (CP 23-26).

Alliant similarly moved to dismiss Tulalip's Third Amended Complaint and the claims asserted therein. CP 47-61. Alliant moved as such on the grounds that Tulalip's claims against Alliant are pleaded no differently than Tulalip's first four claims against Lexington and the other dismissed parties. Although Tulalip incorrectly allege that Alliant (a) is an "insurer" with respect to the relevant policies of insurance or (b) is an agent on behalf of such an insurer, for purposes of ruling on a CR 12(b)(6) all facts alleged in the complaint are taken as true. *Rodriguez v. Loudeye Corp.*, 144 Wash. App. 709, 717 (2014).

On November 30, 2023, the trial court granted Alliant's Motion to Dismiss and thereby dismissed Tulalip's claims against Alliant with prejudice. CP 33-35. The trial court's order (CP 33-35) granting Alliant's Motion was unquestionably appropriate and in compliance with Washington law. Accordingly, Alliant requests that the Order be affirmed.

II. ISSUE

Did the trial court properly dismiss the Third Amended Complaint (CP 924-976) against Alliant pursuant to Civil Rule 12?

III. RESPONSE TO ASSIGNMENT OF ERROR

The trial court properly dismissed Tulalip's Third Amended Complaint against Alliant pursuant to CR 12(b)(6) because if Tulalip's allegation that Alliant is an insurer is taken as true, the claim fails as a matter of law.

IV. STATEMENT OF THE CASE

A. Summary of Allegations.

In the Third Amended Complaint, Tulalip asserted claims against Alliant in its first four causes of action: (1) breach of contract; (2) negligence; (3) violation of the Washington Consumer Protection Act (“CPA”); and (4) declaratory relief. *See* CP 924-976 at ¶¶’s 72-84. These first four causes of action initially included claims against all other defendants. *Id.* However, Tulalip also had a fifth cause of action for violation of RCW 48.30.015 against all defendants except Alliant. *Id.* at ¶¶’s 176-183.

B. The Basis for the Above Allegations Is the Incorrect Assertion that Alliant is an Insurer.

The Third Amended Complaint alleges that Alliant “may be determined in this suit to have acted herein as an insurer . . . Alliant created or participated in the creation of the Tribal Property Insurance Program and sold it as insurance . . . to plaintiffs herein.” CP 924-976 ¶ 12. Further, Tulalip alleges that “[i]n its capacity as an authorized agent for each defendant, and

pursuant to RCW 48.15, Alliant marketed, negotiated, drafted, underwrote and/or sold certain property and business interruption insurance and other insurance . . . to plaintiffs . . . Alliant issued insurance to plaintiffs as the term insurance is defined under RCW 48.01.040 . . .” *Id.* ¶ 13.

Based on the above allegation in the Third Amended Complaint, Tulalip’s sole basis for seeking relief against Alliant was that Alliant is an insurer. For example, Tulalip pleads that “[t]he conduct of each defendant constitutes a breach of the Insurance Contracts sold by Alliant and/or any other coverage agreement issued by defendants.” CP 924-976 ¶ 160. By way of further example, the Third Amended Complaint seeks declaratory relief on the grounds that “the Insurance Contracts cover the losses that [Tulalip has] suffered . . .” and “defendants are responsible for full and timely payment of plaintiffs’ losses described above.” *Id.* ¶¶’s 173-174.

Although not relevant to this appeal, Alliant is the program administrator for Tribal First Insurance Program I, not an insurer. CP 50:21-23.

C. Procedural History.

The Third Amended Complaint sought relief against 15 parties, including Lexington. CP 925 – 927 at ¶¶’s 3 – 12. Lexington moved to dismiss the Third Amended Complaint on the primary grounds that it failed to plead any direct physical loss or damage to property. CP 885 – 923. Several parties similarly situated to Lexington joined Lexington’s motion to dismiss, including Arch Specialty Insurance Company (CP 97–102), Allied World National Assurance Company (CP No. 320-324), Homeland Insurance Company (CP 91-96), Subscribing Underwriters at Lloyd’s (CP No. 314-319), and Evanston Insurance Company (CP 301-308). The trial court granted Lexington’s motion to dismiss. CP 76 – 79.

Subsequently, Alliant moved to dismiss the Third Amended Complaint on the grounds that Tulalip’s allegations

against Alliant are pled no differently than Tulalip's first four claims against Lexington. CP 47 – 61. Further, although the Third Amended Complaint (CP 924-976) incorrectly alleges that Alliant (a) is an “insurer” with respect to the relevant policies of insurance or (b) is an agent on behalf of such an insurer, for purposes of ruling on a CR 12(b)(6) all facts alleged in the complaint are taken as true. CP 48:22-26.

V. ARGUMENT

A. **The Allegations in the Third Amended Complaint, When Taken As True, Fail To State a Claim for Which Relief Can Be Granted.**

A motion to dismiss for failure to state a claim upon which relief can be granted is reviewed *de novo*. *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 92, 371 P.3d 84 (2016) (*citing Trujillo v. NW Trustee Servs., Inc.*, 183 W.2d 830, 355 P.3d 1100 (2015)). Under CR 12(b)(6), a motion to dismiss shall be granted when it appears beyond doubt that the plaintiff cannot provide any set of facts, consistent with the complaint, that would justify recovery against the defendant. *Id.*

Notably, for purposes of evaluating a CR 12(b)(6) motion to dismiss, “[a]ll facts alleged in the complaint are presumed true.” *Rodriguez v. Loudeye Corp.*, 144 Wash. App. 709, 717 (2014). Even though Alliant disputes Tulalip’s characterization of Alliant as an insurer, Tulalip’s allegation that Alliant is an insurer must be taken as true. Since the same is the sole basis for Tulalip’s four causes of action against Alliant, the trial court appropriately dismissed the Third Amended Complaint under CR 12(b)(6) for the reasons outlined in the Respondent Insurers’ brief.. *Id.*

VI. CONCLUSION

For the foregoing reasons, the Court should uphold the trial court’s order dismissing the Third Amended Complaint.

Pursuant to RAP 18.17(c)(2), I certify that this document contains 1,177 words, excluding the parts of the document that are exempted by the Rule.

//

RESPECTFULLY SUBMITTED this 3rd day of May,
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