

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ASPEN SPECIALTY INSURANCE COMPANY, vs. WILLIS ALLEN REAL ESTATE,	Plaintiff, Defendant.
--	------------------------------

CASE NO. 14cv105-LAW (WVG)
ORDER DENYING MOTION TO DISMISS

Aspen Speciality Insurance Company brought this lawsuit against Willis Allen Real Estate to rescind a liability insurance policy. Willis Allen filed a Counter-Complaint against Aspen for failure to effectuate a settlement with a third-party within policy limits. Aspen has moved to dismiss the Counter-Complaint. (Docket no. 26.)

I. Factual Background

A. Willis Allen's Insurance Policy

Aspen issued a "claims made" insurance policy to Willis Allen, a real estate company. Under the policy, Aspen insured Willis Allen up to \$2 million for damages arising out of negligence committed in the performance of its professional services, and Aspen was required to defend and investigate claims against Willis Allen.

B. The Polamalus' Lawsuit Against Willis Allen

Troy and Theodora Polamalu purchased a home through Willis Allen. Thereafter, a landslide caused a significant portion of their backyard to slide into an adjacent canyon. They

1 sued multiple defendants, including Willis Allen, seeking rescission of the house purchase
2 and recovery of the cost of making home improvements. Willis Allen tendered the defense
3 of the Polamalus' complaint to Aspen, and Aspen agreed to defend.

4 During the Polamalus' litigation, the parties engaged in settlement efforts, including
5 mediation. Willis Allen alleges: its defense counsel kept Aspen abreast of settlement efforts;
6 defense counsel made Aspen aware of the possibility of above policy limits liability; defense
7 counsel requested the authority to settle up to policy limits; and Willis Allen learned it could
8 resolve the Polamalus' claims for substantially less than the policy limits and informed Aspen
9 of this fact. But, Willis Allen alleges, Aspen didn't give policy limits settlement authority and
10 made settlement offers well below the amount the Polamalus requested. Willis Allen
11 contends these "lowball" offers prevented a settlement from being effectuated and drew out
12 settlement negotiations. The Polamalus eventually settled with Willis Allen, but only after they
13 had settled with all other defendants. The settlement completely exhausted the policy and
14 Willis Allen was required to contribute substantial monies of its own. Willis Allen alleges that,
15 absent Aspen's gamesmanship, it wouldn't have needed to contribute to the settlement.

16 **C. Aspen's Lawsuit against Willis Allen and Willis Allen's Counter-Claim**

17 In January 2014, before the settlement with the Polamalus was completed, Aspen filed
18 its complaint against Willis Allen seeking declaratory judgment and rescission of the policy.
19 Aspen alleged that Willis Allen misrepresented material facts when it obtained the policy from
20 Aspen and that the Polamalus' claims against Willis Allen were not covered by the policy. In
21 October 2014, Willis Allen filed its Counter-Complaint for breach of contract and tortious
22 breach of the implied covenant of good faith and fair dealing, alleging Aspen acted in bad
23 faith when it ignored liability exposure and refused to give policy limits settlement authority.

24 Aspen now moves to dismiss Willis Allen's Counter-Complaint for failure to sufficiently
25 allege a cause of action. (See Docket no. 26.) It argues that Willis Allen has failed to
26 adequately allege claims for breach of contract and breach of the implied covenant of good
27 faith and fair dealing, because Willis Allen didn't allege that the Polamalus made a policy
28 limits demand or otherwise indicated they would settle within policy limits. Thus, according

1 to Aspen, it had no duty to settle, only a duty to negotiate, which it met by participating in
2 settlement negotiations and making settlement offers.

3 **II. Discussion**

4 **A. Legal Standard**

5 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
6 of a complaint. Fed. R. Civ. P. 12(b)(6). The Court must accept all factual allegations as true
7 and construe them in the light most favorable to the non-moving party—Willis Allen. *Cedars*
8 *Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).
9 To defeat Aspen's motion to dismiss, Willis Allen's factual allegations need not be detailed,
10 but they must be sufficient to "raise a right to relief above the speculative level" *Bell Atl.*
11 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, "[s]ome threshold of plausibility must
12 be crossed at the outset" before a case can go forward. *Id.* at 558 (quotation omitted). A
13 claim has "facial plausibility when the plaintiff pleads factual content that allows the court to
14 draw the reasonable inference that the defendant is liable for the misconduct alleged."
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a
16 'probability requirement,' but it asks for more than a sheer possibility that a defendant has
17 acted unlawfully." *Id.* While the Court must draw all reasonable inferences in Willis Allen's
18 favor, it need not "necessarily assume the truth of legal conclusions merely because they are
19 cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,
20 1139 (9th Cir. 2003) (quotation omitted).

21 **B. Analysis**

22 Aspen argues that Willis Allen's claims for breach of contract and breach of the implied
23 covenant of good faith and fair dealing should be dismissed because Willis Allen hasn't
24 alleged either "(1) a policy limits demand [by the Polamalus], or (2) an opportunity to settle,
25 presented by [the Polamalus], within policy limits." (Docket no. 26 at 5, 9).

26 An insurer is obligated to act reasonably to protect their insureds from liability in
27 excess of policy limits. Thus, "under California law, an insurer has a duty to effectuate
28 settlement where liability is reasonably clear, even in the absence of a settlement demand."

1 *Travelers Indem. Co. of Conn. v. Arch Specialty Ins. Co.*, 2013 WL 6198966, at *8 (E.D. Cal.
2 Nov. 27, 2013) (quoting as persuasive authority *Du v. Allstate Ins. Co.*, 681 F.3d 1118, 1122
3 (9th Cir. 2012), amended and resolved on other grounds at 697 F.3d 753, 758 (9th Cir.
4 2012)). "Effectuate' means to put into force or operation." *Id.* (quotation omitted). "Therefore,
5 to act in good faith, and to attempt to effectuate settlement, [an insurer is] required to do
6 something in an attempt to bring about a settlement." *Id.* "[T]he inquiry is whether the insurer
7 refused in bad faith a reasonable opportunity to settle." *Id.* at *9. Addressing claims for
8 breach of contract and breach of the implied covenant of good faith and fair dealing, *Reid v.*
9 *Mercury Ins. Co.*, 220 Cal. App. 4th 262 (2013) explained:

10 For bad faith liability to attach to an insurer's failure to pursue settlement
11 discussions, in a case where the insured is exposed to a judgment beyond
12 policy limits, there must be, at a minimum, [1] some evidence either that the
13 injured party has communicated to the insurer an interest in settlement, or [2]
*some other circumstance demonstrating the insurer knew that settlement within
policy limits could feasibly be negotiated.*

14 *Id.* at 272 (emphasis added). "[W]hether or not an insurer is guilty of bad faith is ordinarily a
15 question of fact." *Highlands Ins. Co. v. Cont'l*, 64 F.3d 514, 517 (9th Cir. 1995).

16 Citing *Reid*, Aspen contends the injured party must express an interest in settlement
17 to trigger an insurer's duty to pursue good faith settlement discussions. Aspen is mistaken.
18 All that's required is *some circumstance* showing that Aspen knew settlement within policy
19 limits was feasible. *Reid*, 220 Cal. App. 4th at 272. *Reid* doesn't require that the circumstance
20 be presented by the injured party. The Counter-Complaint specifically alleges such a
21 circumstance. It explains "Willis Allen learned that if it could come up with substantially less
22 than the policy limits available, it likely could resolve the Polamalus' claims against it. Willis
23 Allen informed Aspen Specialty of this opportunity." (Docket no. 23, ¶ 25.) It also alleges that
24 the Polamalus engaged in mediation in hopes of settling the case, Willis Allen's defense
25 counsel warned Aspen of potential above policy limits damages, and defense counsel
26 requested policy limits settlement authority, but Aspen refused. (*Id.*, ¶¶ 16, 21, 22.) Accepting
27 these factual allegations as true and construing them in the light most favorable to Willis
28 Allen, the Counter-Complaint plausibly alleges that Aspen "refused in bad faith a reasonable

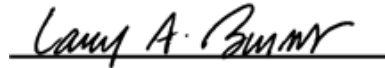
1 opportunity to settle." Thus, Willis Allen's allegations are sufficient to survive Aspen's motion
2 to dismiss.

3 **III. Conclusion**

4 Aspen's motion to dismiss is **DENIED**.

5 **IT IS SO ORDERED.**

6 DATED: June 15, 2015

7 

8 **HONORABLE LARRY ALAN BURNS**
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28