

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Scottsdale Insurance Company,	§	
<i>Plaintiff,</i>	§	
v.	§	Civil Action H-05-1443
	§	
Parvin Shahinpour, d/b/a Taste of Katy,	§	
<i>et al.,</i>	§	
<i>Defendants.</i>	§	

MEMORANDUM AND RECOMMENDATION

Third party defendant Katy Insurance Agency, Inc. (“Katy”) has filed a motion to dismiss the claims of third party plaintiff Mason Park Partners, L.P. (Dkt 27). Having considered the parties’ submissions and applicable legal authorities, the court recommends that Katy’s motion be granted in part and denied in part.

I. BACKGROUND

The Taste of Katy restaurant was severely damaged by a fire on the night of October 31, 2004. Parvin Shahinpour purchased the restaurant Taste of Katy, previously known as Texas Burger & Grill, on or about July 1, 2004 from her sister and her sister’s husband, Amir Mahdejian. Plaintiff Scottsdale Insurance Company issued property damage and commercial general liability insurance policy number CPS0645636, to defendant Parvin Shahinpour d/b/a Taste of Katy (“Taste of Katy”) effective August 1, 2004 through December 31, 2004. The policy carried limits of liability of \$400,000.00 for business personal property and \$87,750.00 for business

interruption. On November 1, 2004, Taste of Katy made a claim in the amount of the policy limits for losses due to the fire.

Mason Park is the owner of the building in which Taste of Katy was a tenant. Taste of Katy's lease agreement required it to secure insurance designating the landlord as a loss payee for property insurance and as an additional insured for commercial general liability insurance. On July 12, 2004 Katy issued a certificate of insurance showing that Taste of Katy had \$1,000,000 worth of commercial general liability coverage plus \$100,000 worth of property damage coverage for the rented premises. The certificate of insurance identifies Mason Park as a "certificate holder." Mason Park alleges that the certificate of insurance indicates that it was an additional insured under the Scottsdale policy and that it relied upon that certificate of insurance in agreeing to the assignment of the lease from Mahdejian to Shahinpour. Mason Park asserts causes of action against Katy Insurance Agency for breach of contract, breach of the common law duty of good faith and fair dealing, violations of articles 21.21 and 21.55 of the Texas Insurance Code, and violations of articles 17.46 and 17.50 of the Texas Deceptive Trade Practices Act.

II. RULE 12(b)(6) STANDARDS

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must be liberally construed in favor of the plaintiff, and

all facts pleaded in the complaint must be taken as true. *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 725 (5th Cir. 2002). The district court may not dismiss a complaint under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Put differently, a claim is legally insufficient under Rule 12(b)(6) “only if there is no set of facts that could be proven consistent with the allegations in the complaint that would entitle the plaintiff to relief.” *Power Entertainment, Inc. v. Nat’l Football League Properties, Inc.*, 151 F.3d 247, 249 (5th Cir. 1998). Furthermore, a plaintiff must plead specific facts, not mere conclusory allegations or unwarranted deductions of fact, in order to avoid dismissal for failure to state a claim. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

The certificate of insurance and select excerpts from the policy are attached to Mason Park’s complaint. The court will consider these attachments to Mason Park’s pleading when deciding the motion to dismiss. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

III. ANALYSIS

A. Breach of contract

Mason Park asserts that Katy has breached the certificate of insurance and the policy itself. Mason Park argues that it is entitled to bring suit against Katy because it is a third party beneficiary of the policy. In support, Mason Park cites a Supreme Court case in which an employee sued a union under a collective bargaining agreement, *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 865 n.7 (1987), for the general proposition that a third-party beneficiary ordinarily has the right to bring a claim based upon the contract.¹ Even if Mason Park is a third party beneficiary of the Scottsdale policy, an issue the court does not decide here, Katy is not a party to the policy. *Hechler* does not support the right of a third party beneficiary to sue a stranger to the contract for breach of contract.

The only possible basis for Mason Park's breach of contract cause of action against Katy is the July 12, 2004 certificate of insurance. The certificate of insurance contains the following statements in conspicuous type:

1 Mason Park also cites *Bell v. Preferred Life Assurance Society*, 320 U.S. 238 (1943). *Bell* is inapposite. In that case, plaintiff sued an insurer, not the agent, for fraud, not breach of contract, based on the agent's alleged misrepresentations as to the value of coverage. The issue before the court was whether the complaint as a matter of law stated a claim in excess of the minimum amount in controversy for jurisdiction.

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES[.] AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

And finally:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

The certificate of insurance does not obligate Katy to pay insurance proceeds under the referenced policy. It clearly states that it is provided for information only, and does not alter the terms of the policy. Contrary to Mason Park's representation, the certificate of insurance does not identify Mason Park as an additional insured under the policy. Also contrary to Mason Park's representation, the certificate of insurance does not require Katy to provide any notice to Mason Park, but says only that the

insurer (in this case Scottsdale) will endeavor, but is not obligated, to give 10 days notice of policy changes.

TIG Insurance v. Via Net, No. 01-04-00102-CV, 2005 WL 1189679 (Tex. App.–Houston [1st Dist.] 2005, pet. filed), relied upon heavily by Mason Park, does not support Mason Park’s claim against Katy.² In that case, plaintiff Safety Lights had a company policy that required all vendors, including Via Net, add Safety Lights as an additional insured to the vendor’s liability policy. Safety Lights required Via Net to provide a certificate of insurance evidencing that Safety Lights was an additional insured under Via Net’s policy. An insurance broker issued a certificate to Safety Lights as “holder.” The certificate contained some of the same language as the certificate at issue, particularly that the certificate was “issued as a matter of information only” and did not “amend, extend or alter” the policy. However, the certificate also contained language not present in the certificate at issue, particularly that “Certificate holder is added as an additional insured re: general liability.” *Id.* at *1.

2 Mason Park also relies on *Scottsdale Ins. Co. v. National Emer. Serv., Inc.*, 175 S.W.3d 284 (Tex. App.–Houston [1st Dist.] 2004, n.w.h.). *Scottsdale* involved a dispute over the insurer’s wrongful cancellation of an insurance policy. A jury found Scottsdale liable for breach of contract, breach of the duty of good faith and fair dealing, and violation of the Texas Insurance Code and found Scottsdale’s agent liable for violation of the Texas Insurance Code. 175 S.W.3d at 290. The state court of appeals primarily addressed whether the trial court applied the proper state law to the plaintiff’s claims. The *Scottsdale* case does not involve alleged misrepresentations in a certificate of insurance or a breach of contract claim against an agent.

A Via Net employee was injured on the job and sued Safety Lights. Via Net's insurer informed Safety Lights it was not an additional insured under Via Net's liability policy. After settling the injured worker's case, Safety Lights and its insurer, TIG Insurance, sued Via Net's insurer and the insurance broker that issued the certificate. A federal district court ruled in favor the insurer and broker in that case, holding that Safety Lights did not have a cause of action for negligence or misrepresentation because it was not reasonable for Safety Lights to believe it had coverage based on the certificate of insurance. *Id.* *2; *TIG Ins. Co. v. Sedgwick James of Washington*, 184 F. Supp. 2d 591, 597-98 (S.D. Tex. 2001). The federal district court held that a certificate of insurance could not extend the coverage of the policy by adding an additional insured. *TIG Ins. Co.*, 184 F. Supp. 2d at 598. The Fifth Circuit affirmed the district court's ruling. *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002).

Safety Lights and TIG then sued Via Net in state court for failing to add Safety Lights as an additional insured. The trial court granted summary judgment to defendants based on the statute of limitations. The state appellate court examined the language of the certificate of insurance solely for the purpose of determining when Safety Lights's breach of contract cause of action against Via Net accrued. Via Net argued that the certificate of insurance put Safety Lights on notice of the need to inquire

further as to whether Safety Lights was an additional insured on Via Net's policy. *Id.* at *5. The court rejected this argument, explaining that while the certificate of insurance included disclaimers regarding the existence of coverage, it did not warn Safety Lights that it may not be an additional insured. *Id.* at *6. To the contrary, the certificate of insurance in *Via Net* expressly stated that Safety Lights was an additional insured under Via Net's liability policy.

Here, the certificate of insurance did not represent that Mason Park was an additional insured under the policy. It did not amend, extend, or alter any terms of the policy.³ A certificate of insurance does not create a contract for insurance coverage. *See TIG Ins. Co.*, F. Supp. 2d at 598 (citing *Granite Constr. Co. v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex. App.—Amarillo 1992, no writ)). Mason Park has cited no case permitting a breach of contract action against an insurance agent based on a certificate of insurance. Katy's motion to dismiss Mason Park's breach of contract claim should be granted.

3 The court notes that contrary to Mason Park's allegations, the loss payee provision of the policy, attached to the Third Party Complaint, does not indicate that Mason Park is a "loss payee" under the policy. Instead, the policy provision says that the name and address of the loss payee is "to follow." That loss payee provision, denoted CP 12 18 06 95, was cancelled by a change endorsement effective August 1, 2004. At the same time, Mason Park was added as an additional insured to the commercial general liability provision of the policy. The ultimate issue of Mason Park's coverage under the policy is the subject of Scottsdale's declaratory judgment action and will not be resolved in the context of the current third party motion.

B. Good Faith and Fair Dealing

Mason Park alleges that Katy breached its duty of good faith and fair dealing by unreasonably delaying the resolution of its claim to insurance proceeds, attempting to resolve the claim for a fraction of its value, and failing to reasonably investigate the claim.

Under Texas law, a duty of good faith and fair dealing does not arise in every contract, but only as a result of a special relationship between the parties to a contract. *Arnold v. National Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). Insurers owe a duty of good faith and fair dealing to their insureds because insurance contracts are the result of unequal bargaining power and by their nature allow unscrupulous insurers to take advantage of their insureds. *Id.*; *Natividad v. Alexis, Inc.*, 875 S.w.2d 695, 697-98 (Tex. 1994). The insurer's duty is non-delegable, and does not extend to its agents or contractors. *Natividad*, at 698. "The insurance companies must answer for the 'sins' of their agents." *Id.* at 698 n.7. Therefore, Mason Park's claim against Katy for breach of good faith and fair dealing should be dismissed because Katy was not acting as the insurer on the policy.

C. Texas Insurance Code Article 21.21

Article 21.21 of the Texas Insurance Code prohibits unfair or deceptive practices in the business of insurance.⁴ Mason Park alleges that the same facts that support its claim for breach of the duty of good faith and fair dealing also support a claim for violation of Article 21.21. Katy argues essentially that Mason Park's damages were not caused by any actions Katy took or failed to take, but by the terms of the insurance policy. Because Mason Park is deemed to know the terms of its insurance policy, *see Heritage Manor of Blaylock Prop. v Peterson*, 677 S.W.2d 689, 691 (Tex. App.–Dallas 1984), Katy argues that Mason Park could not have relied to its detriment on anything Katy said or did regarding the policy.

Katy's argument assumes that Mason Park does not have a valid claim under the policy. While it is true that in order to prevail on this claim against Katy, Mason Park must prove that it has a valid claim under the policy, that issue is currently the subject of pending motions for summary judgment by and between Mason Park and Scottsdale

⁴ Articles 21.21 and 21.55 of the Texas Insurance Code were repealed effective April 1, 2005. This suit was filed on April 25, 2005. Because Katy Insurance has not raised this issue, the court assumes, without deciding, that Mason Park's claim, which accrued prior to April 1, 2005, was not affected by repeal of the statutes. *See* TEX. GOV'T CODE § 311.031. The court's ruling is without prejudice to further motion to dismiss solely on the basis of the repeal of Articles 21.21 and 21.55 if appropriate.

Insurance. The court declines to issue a ruling on that question in the context of the current motion.⁵

Mason Park's allegations relate to claim handling, not to representations made in the certificate of insurance regarding coverage. Katy is a person subject to liability under Article 21.21. Tex. Ins. Code Art. 21.21, § 2(a). As a matter of pleading, Mason Park has stated a claim, and Katy's motion to dismiss should be denied at this stage of the proceedings.

D. Texas Insurance Code Article 21.55

Mason Park alleges that Katy's delay and continued refusal to pay the actual value of its claim constitute a violation of Texas Insurance Code Article 21.55. Article 21.55 prohibits an *insurer* from wrongfully rejecting an insurance claim. The insurer is the party responsible for paying the claim. Scottsdale, not Katy, is the insurer in this case. Therefore, Mason Park's claim against Katy for violation of Article 21.55 should be dismissed.

5 The court's reluctance to do so is based in part on a current dispute between Mason Park and Scottsdale Insurance over the contents of the policy.

E. Texas Deceptive Trade Practices Act §§ 17.46 and 17.50

Mason Park alleges that Katy's actions violate § 17.46 of the Texas Deceptive Trade Practices Act (DTPA) and that it is entitled to recover for Katy Insurance's unconscionable acts as provided by DTPA § 1750(a)(3). Mason Park again relies upon the *TIG Ins. Co. v. Via Net* and *Scottsdale Ins. Co. v. National Emer. Serv.* cases. Again, Mason Park's reliance on these cases is misplaced to the extent it attempts to premise its DTPA claims on representations in the certificate of insurance.

However, to the extent Mason Park's DTPA claim is premised *solely* on Katy's alleged violation of Texas Insurance Code Article 21.21, it survives the motion to dismiss. Actions that violate Article 21.21 because they are deceptive or unfair may also constitute violations of the DTPA. *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 135 (Tex. 1988). Thus, Katy's motion to dismiss Mason Park's DTPA claims based upon a violation of Texas Insurance Code Article 21.21 should be denied at this stage of the proceedings.

IV. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that Katy Insurance's motion to dismiss should be granted in part and denied in part as set forth above.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will

preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on March 14, 2006.


Stephen Wm Smith
United States Magistrate Judge