Apatow v. Am. Bankers Ins. Co.

United States District Court for the Central District of California

December 21, 2016, Decided; December 21, 2016, Filed

Case No. 16-198 MWF (MRWx)

Reporter
2016 U.S. Dist. LEXIS 180529 *; 2016 WL 7422288

Judd Apatow v. American Bankers Insurance Company of Florida, et al.

Core Terms

federal court, state court, limitations period, one year, tolled, statute of limitations, district court, reopened, plaintiff's claim, restarted, cases, flood, motion to dismiss, denial letter, allegations, one-year, argues

Counsel: **[*1]** Attorneys for Plaintiff: Not Present.

Attorneys for Defendant: Not Present.

Judges: MICHAEL W. FITZGERALD, United States District Judge.

Opinion by: MICHAEL W. FITZGERALD

Opinion

CIVIL MINUTES—GENERAL

Proceedings (In Chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [40]

On October 31, 2016, Defendant American Bankers Insurance Company of Florida filed a Motion to Dismiss Plaintiff Judd Apatow's First Amended Complaint. ("the Motion," Docket No. 40). Plaintiff filed an Opposition on November 7, 2016. (Docket No. 42). Defendant filed a Reply on November 14, 2016. (Docket No. 44). The Court reviewed and considered the parties' submissions, and held a hearing on **December 19, 2016**.

The Motion is **GRANTED** on jurisdictional grounds, and therefore leave to amend is denied. It is undisputed that the action was not filed in district court within the one-year statute of limitations. On the alleged facts, the Court can determine as a matter of law that the insurance dispute was not reopened in a manner sufficient to restart the limitations period.

I. BACKGROUND

Plaintiff owns a home in Malibu, California. (First Amended Complaint ("FAC"), Docket No. 38, at 1). On October 12, 2014, as a result **[*2]** of a storm surge and prolonged wave activity, Plaintiff's property was damaged. (*Id.*). At the time, Defendant insured Plaintiff under a Standard Flood Insurance Policy ("SFIP"), the terms of which are set by Congress. (Motion at 1). Plaintiff submitted a claim for coverage to Defendant after the storm and Defendant investigated the claim. (*Id.*). Defendant then denied the claim by letter dated December 30, 2014. (*Id.*). Plaintiff filed suit in Superior Court on December 11, 2015, alleging Defendant failed to properly compensate him for his losses. Defendant was served with the Complaint on December 28, 2015, and removed the case to this Court on January 11, 2016.

The terms of the SFIP explicitly state that, in the event of a disagreement as to amounts owed due to flood damage, Plaintiff (the insured) must bring suit against Defendant within one year of the denial, and that this suit must be brought in federal court. (SFIP at Art. VII.R, Docket No. 38 at 17). Plaintiff's SFIP with Defendant is part of the National Flood Insurance Program ("NFIP"), a federally supervised and guaranteed program administered by the Federal Emergency Management Agency. *In re Van Holt, 163 F.3d 161, 165 (3d Cir. 1998)*. The program was created, in part, to **[*3]** "spread the risk of flood damage among many private insurers and the federal government, and make flood insurance 'available on reasonable terms and conditions' to those in need of it." *Id.*

Defendant is a Write-Your-Own ("WYO") program

carrier participating in the government's NFIP. The terms of the SFIP, like those of all SFIPs under the NFIP, are governed by FEMA's regulations. For example, the Article requiring Plaintiff to bring suit in federal court within one year of the Denial Letter is codified at *44 C.F.R. Pt. 61, App. A(1), Art. VII.R*. ("If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.").

II. LEGAL STANDARD

In ruling on a motion under *Rule 12(b)(6)*, the Court follows *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (citation **[*4]** omitted). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Prods. Co., 552 F.3d 934, 937 (9th Cir. 2008)* (holding that a plaintiff had plausibly stated that a label referring to a product containing no fruit juice as "fruit juice snacks" may be misleading to a reasonable consumer). The Court need not accept as true, however, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal, 556 U.S. at 678*. The Court, based on judicial experience and common-sense, must determine whether a complaint plausibly states a claim for relief. *Id. at 679*.

If a defendant seeks to challenge not the plaintiff's substantive allegations but the Court's subject matter jurisdiction, the motion to dismiss must be brought under *Rule 12(b)(1)*. A jurisdictional attack under *Rule 12(b)(1)* may be "facial or factual." *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. In a facial attack, the complaint's allegations must be accepted as true. *Id.* But "in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss **[*5]** into a motion for summary judgment." *Id.*

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion to dismiss for failure to state a claim. *Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016, n.9 (9th Cir. 2012)*. The Court may, however, take judicial notice of matters of public record outside the pleadings that are not subject to reasonable dispute. *Id.*; *Fed. R. Evid. 201(b)*. In addition, the Court may consider documents upon which a complaint relies if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v. Corinthian Colleges, 655 F.3d 984, 999 (9th Cir. 2011)*.

Here, the Court will consider Defendant's Denial Letter, dated December 30, 2014. (Exhibit 1 to Declaration of Elaine Anderson, Docket No. 40-3). The FAC refers to the Denial Letter. (Docket No. 38 at 16). This document is central to Plaintiff's claim because it is the denial he seeks to challenge in his FAC. And Plaintiff does not dispute the authenticity of the document.

III. DISCUSSION

Failure to file suit in federal court within one year of a denial under the NFIP is cause for dismissal of a suit. *See Wagner v. Dir., FEMA, 847 F.2d 515, 521 (9th Cir. 1988)* ("[Plaintiffs] failed to file their lawsuits within one year of FEMA's initial denial of their claims. They **[*6]** were therefore barred from commencing any action based on those claims, and the district court should have dismissed the suits."). In fact, this failure deprives the Court of subject matter jurisdiction over the claims. *Id. at 518*; *see also Robbins v. Forgash, 2014 U.S. Dist. LEXIS 106044, at *11 (D.N.J. July 31, 2014)* ("Because plaintiffs' suit is time-barred, this Court lacks subject matter jurisdiction."). Other federal courts faced with this issue have concluded that a failure to file suit within the one-year limitations period divests the court of jurisdiction. *See, e.g., Price v. Fugate, 2015 U.S. Dist. LEXIS 84498, at *5-6 (W.D. Tex. June 30, 2015)* ("[T]he one-year limitations period for filing suit under *42 U.S.C. § 4072* is more than just a statute of limitations; it is a condition precedent to the United States' waiver of sovereign immunity. A suit filed beyond the one year limitations period is not simply time-barred; the court has no subject matter jurisdiction to consider it." (citations omitted)).

Plaintiff failed to file his Complaint in federal court within one year of the Denial Letter issued on December 30, 2014. Rather, the Complaint was filed in Superior Court and is now in this Court only because Defendant

removed the case here after the one-year limitations period had run. Plaintiff first argues that his filing in Superior Court should be enough to **[*7]** give this Court jurisdiction. The language of the SFIP, however, is more consistent with a requirement that a lawsuit be filed both within one year and in the appropriate district court. This precise situation was not faced in the district court cases cited above, but their jurisdictional view of the policy language is more consistent with viewing the proper forum as a necessary hurdle to overcoming sovereign immunity.

Plaintiff then argues in response to the Motion that Defendant reopened Plaintiff's case in the course of responding to several letters concerning the damage and insurance coverage. At the hearing, Plaintiff emphasized this argument, reiterating that the case was reopened due to the changing nature of Defendant's denial. Plaintiff alleges specifically that after the initial denial letter was mailed on December 30, 2014, several emails exchanged between the insurance broker and the claim adjuster show the case was "reopened" such that the limitations period was enlarged. (Opposition at 9, citing FAC at ¶ 18-22). Defendant ultimately accepted a new Proof of Loss from Plaintiff and ultimately sent Plaintiff a check for some of the damages on January 22, 2016. By sending this check, Plaintiff **[*8]** argues Defendant revoked the initial denial and restarted the statute of limitations. (Opposition at 10).

Plaintiff cites *Wagner v. Director, FEMA, 847 F.2d 515 (9th Cir. 1988)*, in support of this argument. In *Wagner*, the Ninth Circuit had found that the statute of limitations on a claim involving flood insurance had not been restarted after correspondence between the parties because "there is no suggestion that FEMA reopened these cases or ever intended to do so." *Id. at 521*. Plaintiff argues that by contrast there is evidence here that Defendant did reopen the case.

The Court remains unconvinced. The *Wagner* case also includes critical language showing that the types of communications highlighted by Plaintiff are insufficient to restart the one-year limitations period. The court stated that, "[h]olding that FEMA may inadvertently extend the limitations period by answering claimants' inquiries or by considering new information would contravene a strong public policy to encourage an insurance company to reconsider its original denial when confronted with potentially new facts." *Id.* This is what happened here. When confronted with new information, i.e. Plaintiff's new Proof of Loss and associated information, public policy favors allowing Defendant to consider this information **[*9]** without necessarily restarting the limitations period anew. Further, the Ninth Circuit concluded, "[o]nly where the Federal Insurance Administrator expressly and in writing sets aside the previous disallowance of a plaintiff's claim does a new limitations period commence upon a subsequent denial of the claim." *Id.* Defendant is not the Federal Insurance Administrator, so no action it took could have restarted the limitations period in any event.

In addition, the Court fails to see how Defendant's decision to *grant* some of Plaintiff's claims after initially denying all of them could be construed as "reopening" the claims and provide cause for extending the statute of limitations. Once Defendant denied each of Plaintiff's claims, Plaintiff was put on notice that a suit would need to be filed within one year in federal court. The later decision to grant certain claims did not affect the other denials, which remained in place. Thus, the decision to grant some claims did nothing to prejudice Plaintiff's ability to file suit within one year. There may be cause for extending the statute of limitations in situations when plaintiffs receive new *denials* of claims previously unknown to them. Otherwise, **[*10]** defendants could wait until the limitations period had passed, deny supplemental claims, and never be brought to court. But the same cannot be said in situations, like this one, when a plaintiff's claims are partially granted, but the other denials—all previously communicated to the plaintiff—remain in place. Nothing prevented Plaintiff from filing his claims in federal court within one year of the initial denial as required by federal law. As Plaintiff states, the second decision by the Defendant merely denied his claims "for the second time." (Opposition at 9).

Plaintiff further argues that filing the case in state court tolled the statute of limitations. The Court agrees with Defendant that the clear language of the statute, which demands that suit be filed in federal court, does not allow for tolling in this situation. Defendant cites to several out-of-circuit cases that came to the same conclusion. In *Hairston v. Travelers Cas. & Sur. Co.*, the Eleventh Circuit considered whether filing a state court complaint under the NFIP tolls the statute of limitations in federal court. The court first recognized the general presumption that state courts may exercise concurrent jurisdiction over cases arising **[*11]** under federal law. *232 F.3d 1348, 1349 (11th Cir. 2000)* (citing *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981))*. The court found, however, that this presumption was rebutted by the "explicit statutory directive" in *42 U.S.C. § 4072* that

suit must be filed in federal court. *Id. at 1350*. In addition, the court noted the "unmistakable implication from legislative history" that only federal courts may hear such cases. *Id.* (noting the addition of "original jurisdiction" language to the statute in 1983 in response to questions concerning concurrent jurisdiction of state courts). Because the federal court had exclusive jurisdiction over claims under the NFIP, the court concluded the filing of a state court complaint did not toll the statute of limitations. *Id. at 1352-1353* (distinguishing *Burnett v. New York Central Railroad Co., 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)*, because that case involved a statute over which state courts could exercise concurrent jurisdiction).

Similarly, the district court in *Gibson v. Am. Bankers Ins. Co.* concluded the statute of limitations under the NFIP was not tolled by the filing of a state court complaint. *91 F. Supp. 2d 1037, 1040-43 (E.D. Ky. 2000)*. The court, like the Eleventh Circuit, concluded that federal courts exercise exclusive original jurisdiction over these claims. Thus, the general rule allowing relation back to the date of a state court filing would not apply, because state courts are not **[*12]** courts of competent jurisdiction. *Id. at 1042-43* ("In this case, Plaintiffs' complaint was not filed in a competent state court with jurisdiction, and thus the principles of *Burnett* are clearly inapplicable. A competent court is one that has proper jurisdiction of [both] the cause and the parties.").

Although not cited by Plaintiff, the holding of the *Burnett* case would seem to be the strongest argument in favor of tolling here. In that case, the Supreme Court concluded the filing of a state court complaint under the Federal Employers' Liability Act tolled the relevant statute of limitations after the state court complaint was dismissed for improper venue. *380 U.S. at 424*. The Court held that "when a plaintiff begins a timely FELA action in a state court *having jurisdiction*, the FELA limitation is tolled during the pendency of the state suit." *Id. at 434-35* (emphasis added). Thus, the Court's conclusion was grounded in the state court's ability to exercise concurrent jurisdiction under that federal statute. The Court is persuaded by the Eleventh Circuit's decision in *Hairston* that this is not the case with the NFIP. Plaintiff has presented no contrary argument other than to say the out-of-circuit cases were "wrongly decided." **[*13]** (Opposition at 6). The Court disagrees and concludes that the statute of limitations was not tolled during the pendency of the state court action.

IV. CONCLUSION

Accordingly, the Motion is **GRANTED** under *Rule 12(b)(1)* and the action is **DISMISSED** for lack of jurisdiction.

This Order shall constitute notice of entry of judgment pursuant to *Federal Rule of Civil Procedure 58*. Pursuant to *Local Rule 58-6*, the Court **ORDERS** the Clerk to treat this order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.

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