IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

J.L.'S PLAZA 93, LLC, d/b/a PLAZA 93 WEST, f/k/a PLAZA 93 APARTMENTS, Plaintiff, vs. CAPITOL SPECIALTY INSURANCE CORPORATION Defendant.	8:19-CV-184 MEMORANDUM AND ORDER

The plaintiff, J.L.'s Plaza 93, alleged in its complaint, causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing regarding the acts and practices of the defendant, Capitol Specialty Insurance Corporation, in adjusting and settling the plaintiff's hailstorm damage claims. Filing 1. The defendant moved for dismissal of the plaintiff's complaint for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, pursuant to Fed. R. Civ. P. 12(f), an order striking the plaintiff's bad faith claim, or striking the plaintiff's claim for damages predicated on Neb. Rev. Stat. § 44-1540. Filing 10. The Court finds that the defendant's motion to dismiss should be denied, and its motion to strike should be denied in part and granted in part.

I. STANDARD OF REVIEW

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A

complaint must provide more than labels and conclusions; and a formulaic recitation of the elements of a cause of action will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For the purposes of a motion to dismiss a court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.*

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal,* 556 U.S. at 678. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not shown—that the pleader is entitled to relief. *Id.* at 679.

II. BACKGROUND

The plaintiff is the owner of an apartment complex in Omaha, Nebraska, consisting of several buildings. Filing 1 at 1. The defendant, a Wisconsin insurance company, issued a policy of insurance to the plaintiff covering the buildings for perils that included hail damage. Filing 1 at 1-2. On approximately July 29, 2017, the plaintiff's buildings sustained significant damage from a hailstorm. Filing 1 at 3. The plaintiff alleged that the damage its buildings sustained in the storm required replacement of building roofs, as well as repairs to the interior of buildings and additional repairs consistent with applicable building codes. Filing 1 at 3.

The plaintiff promptly filed a claim for damages with the defendant. Filing 1 at 3. The plaintiff alleged that an inspector acting on behalf of the

defendant determined that the building roofs did not require replacement, but did find that the HVAC units located on the roofs were damaged in the storm. Filing 1 at 4. The cost of repairing the HVAC units was less than the plaintiff's deductible, so the defendant was not obligated to indemnify the plaintiff for any storm damage. The plaintiff disputed the adequacy of the defendant's inspection, and questioned the determination that only the HVAC units sited on the roofs were damaged, but that the roofs themselves did not suffer damage requiring replacement. Filing 1 at 4.

As a result of the defendant's alleged inadequate inspection, the plaintiff was required to retain the services of a professional property damage adjuster and an engineer to evaluate the damage to the plaintiff's buildings. Filing 1 at 3-4. Those experts determined that the building roofs needed to be replaced due to storm damage, and the interior water damage in the buildings was a consequence of the damage to the roofs. Filing 1 at 3-4. The plaintiff provided its experts' reports and damage assessments to the defendant, but the defendant refused to reevaluate the plaintiff's claim for damages. Filing 1 at 5-6.

III. DISCUSSION

1. DISMISSAL OF THE COMPLAINT

The defendant asserts that the plaintiff's complaint fails to state a claim for relief because the plaintiff's cause of action for bad faith is based "in whole or in part" on alleged violations of Nebraska's Unfair Insurance Claims Settlement Practices Act, which does not allow for a private right of action. Filing 10. The defendant is half-right. It is true that Nebraska's Unfair Insurance Claims Settlement Practices Act, found at Neb. Rev. Stat. § 44-1536 *et seq*., does not allow for a private right of action. Instead, the purpose of the

Act is to establish standards for the investigation and disposition of insurance policy claims for Nebraska residents (§ 44-1537), and authorizes the Director of the Department of Insurance to take certain measures that ultimately could result in an insurer being assessed a monetary penalty, as well as the suspension of an insurer's license or certificate of authority (§§ 44-1541 to 44-1543). The standards for investigation and disposition of policy claims include eighteen separate practices or acts that would each constitute an unfair claims settlement practice. § 44-1540. For a sanction to be imposed, the Director must conclude that the insurer's act or practice was committed flagrantly and in conscious disregard of the Act or any rule or regulation adopted pursuant to the Act, or committed with such frequency so as to indicate a general business practice. § 44-1539.

The defendant, however, is incorrect regarding its asserted characterization of the plaintiff's complaint. The plaintiff has not based its complaint on the Act. Instead, the plaintiff alleged claims for breach of contract, and for the tort of bad faith refusal to settle the plaintiff's claim. Filing 1 at 7-8. As a preliminary matter, the defendant makes no argument for dismissal of the plaintiff's breach of contract cause of action. Accordingly, dismissal of the entire complaint is unwarranted when the defendant apparently only seeks to narrow the issues by complaining about just one of the two alleged causes of action.

But responding directly to the defendant's assertion, the plaintiff does not rely on a statutory remedy regarding its claim that the defendant breached the implied covenant of good faith and fair dealing imposed on an insurer with respect to an insured's damages claim. The plaintiff's cause of action is predicated on the tort of first-party bad faith in adjusting and settling a claim

with an insurer. The plaintiff does, however, reference the Nebraska Unfair Insurance Claims Settlement Practices Act in its complaint in two instances.

The first reference is in paragraph 51. Filing 1 at 9. Here, the plaintiff alleged that the defendant's refusal to indemnify the plaintiff for its loss in a timely manner violates the common law and § 44-1540 of the Act. A statute may give rise to a tort duty where the purpose of the statute is to protect a class of persons, intended to prevent a particular injury, and intended by the legislative body to create a private right of action. *A.W. v. Lancaster Cnty. School Dist. 0001*, 784 N.W.2d 907, 920 (Neb. 2010). But as discussed above, the Unfair Insurance Claims Settlement Practices Act creates an administrative remedy to be enforced by the Director of the Department of Insurance. The Nebraska Unicameral did not intend for the Act to function as a private remedy. *See McShane Constr. Co., LLC v. Gotham Ins.*, 867 F.3d 923, 928 (8th Cir. 2017).

But the inquiry does not end there. Violation of a statute or regulation, although not negligence per se, may be evidence of negligence, or breach of a duty, which may then be considered with all the other evidence in a case. *Scheele v. Rains*, 874 N.W.2d 867, 872 (Neb. 2016); *Grade v. BNSF Ry. Co.*, 676 F.3d 680, 687 (8th Cir. 2012). Statutes and regulations may represent a consensus view of what a reasonable person would do under the circumstances, and may be helpful to a fact finder in deciding whether a standard of care has been breached. *See Norman v. Ogallala Public School Dist.*, 609 N.W.2d 338, 347 (Neb. 2000) (addressing safety standards).

The defendant does not argue that the plaintiff's reference to § 44-1540 expands the common law tort of bad faith. *See Chew v. American Greetings Corp.*, 754 F.3d 632, 638 (8th Cir. 2014). Indeed, the Court observes that the eighteen proscribed acts and practices identified in § 44-1540 parallel conduct

deemed to evince bad faith settlement tactics such as inadequate investigation, delays in settlement, and false accusations. *See Ruwe v. Farmers Mut. United Ins. Co., Inc.*, 469 N.W.2d 129, 135 (Neb. 1991). The reasonable inference to be drawn from the reference to § 44-1540 in the complaint is that the proscribed acts and practices identified in the Act establish parallel duties already imposed on an insurer under the common law for insurers, such as the defendant, to deal fairly and in good faith with an insured claimant such as the plaintiff. *See Millard Gutter Co. v. State Farm Fire and Casualty Co.*, 8:15-CV-406, 2016 WL 6102325, at *3 (D. Neb. April 8, 2016).

The second reference to the Act is found in the plaintiff's prayer for relief where the plaintiff requests "damages under Neb. Rev. Stat § 44-1540." Filing 1 at 10. The plaintiff's request is a nullity. Section 44-1540 does not provide for a private remedy concerning an insurer's bad faith. But the plaintiff's reference in the complaint's prayer to a nonexistent remedy does not compel dismissal of the entire complaint.

Finally, although not specifically included in the defendant's motion, in its brief, the defendant speculates that, should the Court grant its motion to dismiss, the defendant "doubts that any bad faith claim can be stated upon another try." Filing 11 at 3. The Court disagrees, and finds that the complaint presently before the Court states a plausible claim for relief regarding the defendant's breach of an implied covenant of good faith and fair dealings.

Nebraska recognizes the tort of bad faith refusal to settle a claim with an insured policy holder who thereby suffers some type of direct loss. *LeRette v. American Medical Sec., Inc.,* 705 N.W.2d 41, 47-48 (Neb. 2005); *Valley Boys, Inc. v. Allstate Ins. Co.*, 66 F. Supp. 3d 1179, 1183-84 (D. Neb. 2014). The tort of bad faith springs from an insurer's breach of its implied covenant of good faith and fair dealing with its insureds. *Id.* "The tort embraces any number of

bad faith settlement tactics, such as inadequate investigation, delays in settlement, false accusations, and so forth." *Ruwe*, 469 N.W.2d at 135. To establish a claim of bad faith, the plaintiff must adduce evidence that the insurer lacked a reasonable basis for denying the insurance policy benefits, and the insurer's knowledge, or reckless disregard, of the lack of a reasonable basis for denying the claim. *LeRette*, 705 N.W.2d at 47.

The plaintiff alleged that the defendant's claim adjuster failed to perform any relevant testing or sampling of the roofing materials before concluding that the roofs did not need to be replaced. Filing 1 at 4. The plaintiff alleged that the defendant, in making its determination that the roofs did not need to be replaced, ignored accepted and common practices of the building industry. Consequently, the plaintiff was required to retain a private claim adjuster and engineer to assess the damage to its buildings. Those experts determined that the building roofs required replacement due to storm damage, and that the interior damage to the buildings was a consequence of the roof damage. The plaintiff shared its experts' reports with the defendant, but the defendant continued to refuse to tender the insurance policy proceeds. *Id.*

In addition, the plaintiff alleged that the defendant, through its adjusters and consultants, purposefully sought to lessen its liability by improperly depreciating labor costs, material costs, taxes, business overhead and profits, and did not account for contingencies such as testing for hazardous materials, and the need for containment and removal of hazardous materials, as well as other cost considerations that would be necessary in order to comply with building codes. Filing 1 at 5. The plaintiff alleged that the defendant was made aware of the specific inaccuracies and deficiencies in its damage estimates but failed to correct or re-evaluate its position. As a direct result of the defendant's alleged unfair settlement acts and practices, the plaintiff was

required to expend its own resources to assess damages and repair its buildings.

The Court concludes that the plaintiff has alleged a plausible claim of bad faith insurance settlement. The conduct alleged by the plaintiff includes claims of inadequate investigation, false representations, and refusal to settle the plaintiff's claim, all of which was done knowingly or in reckless disregard of the lack of a reasonable basis for denying the plaintiff's claim.

2. MOTION TO STRIKE

In pertinent part, Fed. R. Civ. P. 12(f) provides that the Court, on its own motion or on the timely motion of a party, may strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter." The defendant's motion to strike (filing 10) the entirety of the plaintiff's bad faith claim (see filing 1 at 8-9) is denied for the reasons stated above. The defendant's motion to strike (filing 10) the plaintiff's reference to § 44-1540 in paragraph 51 of the complaint (see filing 1 at 9) is likewise denied, again for the reasons stated above. The defendant's motion to strike (filing 10) that portion of the plaintiff's prayer claiming damages under § 44-1540 (see filing 1 at 10) shall be granted for the reasons stated above. Section 44-1540 does not provide for damages or a private right of action, and therefore, this portion of the plaintiff's prayer is immaterial.

IT IS ORDERED:

1. The defendant's motion to dismiss the plaintiff's complaint or in the alternative to strike (filing 10) is granted in part and denied in part as set forth above.

2. The plaintiff's claim for damages pursuant to § 44-1540 is stricken. Filing 1 at 10.

3. This matter is referred to the Magistrate Judge for case progression.

Dated this 3rd day of October 2019.

BY THE COURT:

John M. Gerrard
Chief United States District Judge