

**In the United States District  
Court for the District of Colorado  
Judge Daniel D. Domenico**

Case No. 1:20-cv-03295-DDD-NRN

**Cesare Morganti,**

Plaintiff,

v.

**American Family Mutual Insurance Company, S.I.,**

Defendant.

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**Order Denying Motion to Dismiss**

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Defendant American Family Mutual Insurance Company, S.I. moves to dismiss Plaintiff Cesare Morganti's complaint for failure to state a claim. The Court denies the motion.

**Standard of Review**

When presented with a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted). "Mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). So a court can "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* "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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

### **Background**

Mr. Morganti renewed his American Family homeowner’s insurance policy at the outset of 2019. (Doc. 3 at ¶ 7.) Six months later, on June 7, 2019, a windstorm hit Mr. Morganti’s Castle Rock home. (*Id.* at ¶ 16.) Mr. Morganti’s home is in an area with little wind protection, so the windstorm, which averaged 62 miles per hour with gusts up to 112 miles per hour, struck his home at full blast. (*Id.* at ¶¶ 17–18.) The wood-shingled roofs of the garage and the main structure of the home were severely damaged. Mr. Morganti says the damage was “plainly visible”: “wood shakes were elevated and staples were dislodged”; and “multiple rows or sections of wood shakes [shingles] were simultaneously elevated in a perfectly straight fashion.” (*Id.* at ¶¶ 23, 24.)

Mr. Morganti notified American Family of the windstorm damage in early October 2019 and explained he intended to make a claim on his policy. (*Id.* at ¶ 26.) American Family assigned the matter to one of its adjusters, Corwin Frey, who inspected the property on October 16. (*Id.* at ¶¶ 31–32.) Mr. Frey took pictures of the damage. Those pictures, according to Mr. Morganti, show damage consistent with the windstorm: whole rows of shingles raised in the same fashion, fresh breaks and splits in the wood; not wear and tear, such as isolated instances of “warping or curvature” or “cupping or bowing.” (*Id.* at 33–35.) The same day Mr. Frey inspected the property, he denied coverage on behalf of American Family in a denial-of-coverage letter to Mr. Morganti. (*Id.* at ¶ 37.) Mr. Frey wrote that he found no damage from the windstorm in his inspection. The lifted shakes, explained Mr. Frey, were “not

consistent with wind damage and [were] a result of age, wear and tear or other anomaly.” (*Id.* at ¶ 38.) Mr. Morganti alleges that Mr. Frey’s conclusions ran counter to both industry standards for wind damage and common sense. (*Id.* at ¶¶ 39–40.)

Mr. Morganti sought help from a licensed roofing contractor, Ben Landa, who inspected the property and, contra American Family, concluded that the windstorm caused damage to the roofs. He concluded that the roofs needed to be replaced, costing approximately \$81,000. (*Id.* at ¶¶ 47–50.) But without benefits from American Family, Mr. Morganti could not pay Mr. Landa. So Mr. Landa recommended Mr. Morganti obtain a second opinion from a public adjuster named Peter Ridulfo. (*Id.* at ¶¶ 56–57.) Mr. Ridulfo inspected the property in February 2020 and concluded that the damage to the roofs was the result of the windstorm, not wear and tear. (*Id.* at ¶¶ 58–62.) Mr. Ridulfo sent American Family a sworn proof of loss on May 12, 2020 of approximately \$84,000. (*Id.* at ¶ 72.)

Prompted by Mr. Ridulfo’s proof of loss, American Family agreed to reinspect the property. (*Id.* at ¶ 74.) On May 19, American Family sent two of its adjusters, Dustin Sanderson and Brian Mater, to take a look at the property along with Mr. Ridulfo and Seamus Bradley, a licensed contractor. (*Id.* at ¶¶ 75, 77.) Mr. Sanderson emailed Mr. Ridulfo several days later to say that, in his opinion, the damage to the roof was the result of wear and tear. (*Id.* at ¶ 87.)

Another windstorm hit the property about two weeks later. (*Id.* at ¶ 93.) Though it was less severe, Mr. Morganti hired Mr. Bradley to inspect the roofs again. His inspection revealed further wind damage to the shingles. (*Id.* at ¶ 94.)

Mr. Morganti's lawyer sent American Family a notice of claim and demand for payment on July 31, 2020. (*Id.* at ¶ 100.) American Family responded by sending an engineer, Timothy Phelan, to re-reinspect the roof. (*Id.* at ¶ 101.) Mr. Phelan's post-inspection report again concluded that the roof damage was age, not wind, related: "the fractured, displaced, and missing wood shakes at the subject property were consistent with long-term moisture-related dimensional changes in the material . . . not the result of single wind event." (*Id.* at 106.) American Family relied on Mr. Phelan's opinion to again deny coverage, (*id.* at ¶ 113), and this suit for breach of contract, common law bad faith breach of insurance contract, and statutory bad faith ensued. American Family moves to dismiss Mr. Morganti's complaint in its entirety.

## Analysis

### I. Breach of Contract

A claim for breach of contract in Colorado requires proof of a valid contract, breach, and damages. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). American Family argues that the complaint fails to plead breach. The Court disagrees.

Under Mr. Morganti's policy, American agreed to "cover sudden and accidental direct physical loss to" his home and garage. (Doc. 3 at ¶¶ 11, 13.) For loss covered by the policy, American agreed to:

- pay the cost to repair or replace the damaged part of property . . . with material of like construction for similar use on the same premises subject to the following . . . for any loss to wood roof surfaces, we will pay the least of:
  - a. the actual cash value;
  - b. the cost to repair or replace damaged property with materials of like constructions; or
  - c. any policy limit that applies.

(*Id.* at ¶ 13.) Mr. Morganti has sufficiently pleaded a claim of breach of this provision. He alleges that he requested that American Family pay a covered benefit, for damage to the roofs, and American Family refused.

American Family’s motion rests on arguments that might be successful in a Rule 56 motion for summary judgment but cannot serve as a basis for dismissal under Rule 12(b)(6). American Family first points out that the policy requires it to pay the *least of* Mr. Morganti’s roofs’ actual cash value or the cost of repair or replacement. That seems to be true. American Family then asserts that, because the roofs were built in 1972, their actual cash value is nil. So according to American Family, it did not breach the policy when it failed to pay benefits because there were no benefits to pay—the roofs were worthless. (Doc. 15 at 6–7.) That might be true also, but it turns on a question of fact—the value of the roofs. American Family simply asserts that the actual cash value of the roofs was zero due to their age, but the Complaint alleges otherwise. (Doc. 3 at ¶ 19 (alleging that the roofs were in “good condition prior to the storm)).) This argument thus fails to accept the well-pleaded allegations in the complaint as true and cannot serve as a basis for dismissal under Rule 12.

American Family next argues that the complaint fails to plausibly allege facts that the June 2019 windstorm caused the damage to the roofs. American Family points to the fact that Mr. Morganti took four months, from June to October, to make a claim on his insurance. But American Family cites no policy language, case law, or other authority why a four-month delay in making a claim on a home-insurance necessarily defeats a claim for breach of contract. Mr. Morganti’s notice may have been a bit slow. The significance of that delay is, however, a factual question that is an improper basis for dismissal on a Rule 12 motion.

American Family likewise argues that the weather data contained in attachments in the complaint doesn't support the picture painted by Mr. Morganti of an extreme-weather event that severely damaged his roofs. Perhaps. But again, this is a factual dispute about how to read that weather data that the Court cannot wade into at this juncture. American Family's motion is denied as to the claim for breach of contract.

## **II. Statutory and Common Law Bad Faith**

American Family moves to dismiss Mr. Morganti's two claims for bad faith: bad-faith breach of insurance contract, a common-law claim, and unreasonable delay or denial of an insurance benefit, a statutory claim arising under Colo. Rev. Stat. §§ 10-3-1115 and 1116. Both claims require Mr. Morganti to plead and prove that American Family acted unreasonably in handling his claim. Colo. Rev. Stat. § 10-3-115(1); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985) (common law bad faith). The common law claim requires, in addition to unreasonable conduct, proof of "knowledge of or reckless disregard for the fact that no reasonable basis existed for denying the claim." *Savio*, 706 P.2d at 1274. Reasonableness is determined under an objectiveness standard, based on proof of industry standards. *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 415 (Colo. 2004).

At the outset, American Family argues that Mr. Morganti has failed to plead he was entitled to a covered benefit and so his bad faith claims fail. The Court disagrees for the reasons stated above. The complaint sets forth facts that, if true, give rise to a claim for breach of the contract between American Family and Mr. Morganti.

American Family next contends that the complaint fails to plead any plausible allegations its conduct was unreasonable. American Family

says that the complaint instead pleads facts that establish a disagreement only. It points to allegations in the complaint that it promptly conducted what it characterizes as a thorough inspection of the roofs when Mr. Morganti initially submitted notice in October 2019 and again in February 2020 when Mr. Morganti re-contacted the company. American Family says there are no allegations that the inspections fell below industry standards and that it was reasonable for it to rely on its experts.

The Court disagrees the complaint fails to adequately plead unreasonable conduct. The complaint alleges that American Family's initial denial of coverage was preordained. Among other facts, the complaint asserts that Mr. Frey ignored obvious evidence of wind damage and a near total lack of evidence of damage from wear and tear. (Doc. 3 at ¶¶ 32–36.) The complaint alleges, moreover, that Mr. Frey deliberately manipulated the framing of his photographs to make the damage appear age-related. (*Id.* at ¶ 36.) And the complaint alleges that American Family hastily denied coverage the same day Mr. Frey conducted his inspection. (*Id.* at ¶ 37.) The Court must accept these allegations as true for purposes of this motion. And if true, they establish an unreasonable investigation in which American Family, through Mr. Frey, knew or should have known that the damage was wind related.<sup>1</sup> The Court thus denies American Family's motion.

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<sup>1</sup> American Family argues that the allegations of unreasonable conduct are conclusory and thus fail the *Twombly-Iqbal* standard. But the allegations in the complaint—especially those related to Mr. Frey's investigation—are *factual*. They explain why the roofs revealed damage from the wind (uniform raising, for example), and not age.

### **Conclusion**

American Family's motion to dismiss (Doc. 15) is **denied**.

DATED: June 25, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Daniel D. Domenico', written over a horizontal line.

Daniel D. Domenico  
United States District Judge