UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Case No. 4:22-cv-00042-FL

FIRST PROTECTIVE INSURANCE COMPANY, Plaintiff, v. LINDA STOKES RIKE, LEWIS EDWARD O'LEARY, PROBUILDERS OF THE CAROLINAS, INC., WILLIAM SCOTT HEIDELBERG, HEIDELBERG AND MULLENS, INC., RONALD PAUL HICKS, AND STORMPRO PUBLIC ADJUSTERS, LLC, Defendants.	**DEFENDANTS LEWIS EDWARD O'LEARY, AND PROBUILDERS OF THE CAROLINAS, INC., COMBINED MEMORANDUM OF LAW IN SUPPORT OF THEIR: 1. RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS; 2. MOTION FOR PROTECTIVE ORDER; 3. MOTION FOR FEES AND COSTS**

I. INTRODUCTION:

The claims of the Plaintiff, First Protective Insurance Co. ("FP" after this), against Defendant O'Leary, and his company, ProBuilders of the Carolinas, Inc. (collectively "O'Leary" after this) arise out of, and are predicated on, FP's allegations that O'Leary failed to disclose claimed "prior relationships" with Defendants Rike, Hicks, and Heidelberg, before being appointed as the "umpire" in the dispute appraisal process established by the FP insurance policy with Defendant Rike, which policy is the subject of this dispute.

O'Leary, as a mutually appointed umpire, was equivalent to an arbitrator. O'Leary is therefore immune from the alleged claims of FP, pursuant to §1-569.14 of the North Carolina Revised Uniform Arbitration Act ("NCRUAA").[1] There is no applicable exception to such immunity under the facts of this case. Judgment should therefore be entered in favor of O'Leary on the claims of FP against the O'Leary defendants pursuant to the standard of F.R.C.P. Rule 12(c).

Being immune to the claims of FP, O'Leary is also protected from any attempts to take discovery from him pursuant to NCRUAA §1-569.14(d).

NCRUAA §1-569.14(e), also requires that First Protective reimburse O'Leary for all attorneys' fees, and costs, incurred as a result of the improper claims of First Protective.

II. STANDARD OF REVIEW PURSUANT TO RULE 12(c)

As held by this Court in *Griffith v. Clark, et al.,* 2013 WL 6000913, *2 (E.D.N.C., 2013), "Rule 12(c) allows a party to move for judgment on the pleadings, 'after the pleadings are closed-but early enough not to delay trial....' In reviewing a motion for judgment on the pleadings, the court applies 'the same standard' as for

[1] A copy of the NCRUAA is submitted as **Attachment 1** to this memorandum. Sections 1 & 2 "Conditions/Choice of Law" of the FP policy [DE 1-1, p. 43 of 56] provides that North Carolina law governs the claims in question.

motions made pursuant to Rule 12(b)(6). *Burbach Broad Co. v. Elkins Radio Corp*., 278 F.3d 401, 406 (4th Cir.2002). Thus, when a party moves for judgment on the pleadings pursuant to Rule 12(c), the factual allegations of the complaint are taken as true, whereas those of the answer are taken as true only to the extent that they have not been denied, or do not conflict with those in the complaint. *Pledger v. North Carolina Dep't of Health and Human Services,* 7 F.Supp. 2d 705, 707 (E.D.N.C.1998). A federal district court considering a motion to dismiss for failure to state a claim must view the allegations of the claim in the light most favorable to the non-moving party. *See, Ibarra v. United States,* 120 F.3d 472, 474 (4th Cir.1997). To survive a motion to dismiss, the complaint must contain 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

III. RELEVANT FACTS:

This case concerns a dispute over the amount of insurance coverage owed by the Plaintiff, insurer FP, to the Defendant Rike. Section F of the policy established an appraisal "umpire" process to attempt to resolve such disputes [DE 1-1, p. 27 of 56]. That process was mutually invoked by FP, and Rike. First Protective was not required to accept the result of the umpire process. Defendant Scott Heidelberg was

appointed as the appraiser for defendant Rike. James Starrette was appointed as the appraiser for the plaintiff, FP. O'Leary was mutually selected as the umpire.

On or about 16 February 2021, Starrette [for FP] spoke directly with O'Leary, and later stated to Heidelberg that Starrette/FP agreed to O'Leary serving as the umpire on the Rike appraisal. FP alleges in its complaint that O'Leary failed to disclose that he had prior dealings with Rike, and with a contractor for Rike, Hicks, and that he had worked in the past with Heidelberg.[2] FP claims that, because O'Leary predominantly worked on behalf of policyholders against insurers, he was "biased in a general sense (in favor of policyholders)".[3] As established after this, those allegations have no relevance whatsoever to the statutory immunity of O'Leary with regard to his status as an umpire in this dispute.

After review of the appraisals of Starrette, and of Heidelberg, O'Leary, as the umpire, determined that the award would not match up with either Starrette's, nor Heidelberg's, appraisal figures. On 15 March 2022, umpire O'Leary sent the final Appraisal Award, signed by O'Leary, to both Starrette and Heidelberg. On 16

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[2] Complaint, ¶¶ 38, 51-55, 76, 86, 87.

[3] Complaint, ¶¶ 37, 93

March 2022, the Appraisal Award was agreed to, and signed, by Heidelberg [DE 1-3].

FP disputed the award provided by O'Leary as the umpire, and sued O'Leary personally, and his company, ProBuilders of the Carolinas, Inc. as individual Defendants in this case.

IV. GOVERNING LAW

1. Sections 1 & 2, "Conditions/Choice of Law", of the insurance policy, under which the appraisal process was conducted provides that "[A]ny and all claims or disputes in any way related to this policy shall be governed by the laws of North Carolina." [DE 1-1, p. 43 of 56]
2. The NCRUAA, §1-569.1, *et seq.,* applies to, and governs, the appraisal umpire process in which O'Leary participated as the umpire. *North Carolina Farm Bureau Mut. Ins. Co., v. Floyd Wayne Harrell*, 148 N.C.App. 183, 186-187, 557 S.E.2d 580, 582 (2001), citing, *Enzor v. North Carolina Farm Bureau Mutual Ins. Co*., 123 N.C.App. 544, 545-46, 473 S.E.2d 638, 639 (1996).
3. Federal common law has long recognized that arbitrators are clothed with judicial immunity, which extends not only to public officials, but also to private citizens, specifically arbitrators. Whether a private citizen is clothed

with judicial immunity is based on a functionality test. Private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights. *Dalenko v. Collier, Jr*. 191 N.C. App. 713, 430-431 (2008).[4]

4. Pursuant to §1-569.14:

    a. As an umpire acting as a neutral under the express provisions of the FP policy, O'Leary was, and is, statutorily immune from civil liability with regard to the claims of FP. *North Carolina Farm Bureau Mut. Ins. Co., v. Floyd Wayne Harrell*, *supra*, citing *Enzor v. North Carolina Farm Bureau Mutual Ins. Co*., *supra*.

    b. Pursuant to §1-569.14(c), "[T]he failure of an arbitrator to make a disclosure required by G.S. 1-569-12 shall not cause any loss of immunity under this section." Therefore, FP's alleged failure of O'Leary to make disclosures did not cause any loss of O'Leary's statutory immunity;

[4] Also holding that, where claims are barred by arbitrator immunity, they are deemed to be frivolous. *Id*, at 431.

c. Pursuant to §1-569.12, assuming, *arguendo*, that O'Leary had failed to disclose a fact required to have been disclosed under §1-569.12 (a) or (b), FP may seek to ***vacate*** the award if it has made a timely objection;

d. F.R.C.P. Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." A motion for judgment on the pleadings should be granted if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law."

e. First Protective is obligated to reimburse to O'Leary all attorney's fees, costs, and other reasonable expenses of the litigation improperly commenced by FP against O'Leary pursuant §1-569.14(e).

f. NCRAA §1-569.14(d) prohibits any person or party seeking testimony from, or otherwise seeking discovery from, O'Leary with respect to this case.

V. ARGUMENT

1. The O'Leary Defendants are immune from the claims of FP.

FP's claims in this case are, by the terms of the insurance policy, subject to North Carolina law. FP's claims are therefore subject to the provisions of the

NCRUAA. As alleged in the complaint, FP's claims against O'Leary are predicated on allegations that O'Leary failed to disclose prior dealings, or relationships, with the Defendants Rike, Hicks, and Heidelberg prior to his appointment as umpire.[5] N.C.G.S. §1-569.14(c) provides that any alleged failure of O'Leary to make disclosures that may have been required by §1-569.1 "shall not cause any loss of immunity" regarding O'Leary's participation as an umpire in the FP appraisal process. *North Carolina Farm Bureau Mut. Ins. Co., v. Floyd Wayne Harrell*, *supra*, citing *Enzor v. North Carolina Farm Bureau Mutual Ins. Co.*, *supra*.

Applying governing law to FP's alleged facts, O'Leary has clearly established, pursuant to Rule 12(c), that he is immune from the claims of FP, that no material issue of fact remains to be resolved, and that the O'Leary Defendants are entitled to judgment as a matter of law. Pursuant to §1-569.12, if O'Leary had failed to disclose a fact required to have been disclosed under §1-569.12 (a) or (b), FP's sole remedy was to seek to vacate the award.

2. **Discovery may not be obtained from the O'Leary Defendants.**

NCRUAA §1-569-14(d) states that O'Leary "is not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or

[5]Complaint, ¶¶ 38, 51- 55, 76, 86, 87.

ruling occurring during the arbitration proceeding to the same extent as a judge of a court… sitting in a judicial capacity." The exceptions set forth in subparts (1) and (2) of the statute did not apply.

O'Leary's motion seeking a protective order to prevent the taking of any discovery of him that is prohibited by section 1-569-14(d) should therefore be granted.

3. O'Leary's fees and costs must be reimbursed to O'Leary by FP.

NCRUAA §1-569.14(e) provides that, upon a finding that O'Leary is immune from the claims of FP "the court shall award to the arbitrator… reasonable attorney's fees, costs and other reasonable expenses of litigation". Such a finding is appropriate in this case, and an award of fees and costs to O'Leary is therefore mandated by the governing statute, and O'Leary's motion seeking such an award should be granted.

VI. CONCLUSION:

For the reasons set forth herein, judgment should therefore be entered in favor of O'Leary on the claims of FP against O'Leary, O'Leary's motion requesting a protective order from any discovery in this case should be granted, and O'Leary's motion for fees and costs required to be reimbursed by statute should be granted,

subject to an appropriate submission by counsel with regard to those fees and costs to be determined by the Court.

This the 21st day of June, 2023.

THE FARRELL LAW GROUP, P.C.

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