IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

MARTHA GOMEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION FILE NO. 4:24-cv-00099-WMR**
	)	
FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN,	)	
	)	
Defendant.	)	

MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT

Defendant Foremost Insurance Company Grand Rapids, Michigan ("Foremost") moves to dismiss Plaintiff's Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 7.)

FACTS

In her Amended Complaint, Plaintiff Martha Gomez seeks insurance coverage for property damage from a fallen tree. (Doc. 7, ¶ 11.) Specifically, she contends the damage falls within the "Dwelling" coverage of her policy issued by Foremost which provides as follows:

> We insure direct, abrupt, and accidental physical loss to the property described in Coverage A – Dwelling and Coverage B – Other Structures unless the loss is excluded elsewhere in this policy.

(*Id.* ¶¶ 6-7 and 12; Doc. 7-1, p. 14.) The Declarations Page shows that Gomez

purchased coverage for her "Dwelling" under Coverage A but does not show coverage for "Other Structures" under Coverage B. (Doc. 7-2, p. 2.) The question, therefore, is whether the claimed damage is within the scope of "Coverage A – Dwelling" that reads in its entirety as follows:

> **COVERAGE A – Dwelling**
>
> We insure:
>
> 1. Your dwelling shown on the Declarations Page;
>
> 2. Materials and supplies on your premises for use in the construction, alteration, or repair of your dwelling shown on the Declarations Page;
>
> 3. Any structure you own on your premises that is attached to your dwelling, other than another structure attached by a fence, utility line, or similar connection; and
>
> 4. Your fixtures and appliances that built in or permanently affixed to your dwelling.
>
> We do not insure:
>
> 1. Land, including any cost to repair, rebuild, stabilize or otherwise restore land, including land on which your dwelling is located, either before or after a loss; or,
>
> 2. Loss, including damage or remediation costs, caused by or resulting from the presence of mold, mildew, or other fungi, their secretions, or dry or wet rot of any kind regardless of the cause, condition, or loss that led to their formation or growth.

(Doc. 7-1, p. 10.)

Although Gomez characterizes her claim as damage to a "garage," the photographs she attached to her Complaint plainly depict a stand-alone shed that is detached from any other structure *and not a dwelling*:

(Doc. 7-3, p. 2.) As Gomez's photograph plainly shows, the damaged structure does not fall within the scope of coverage for a "dwelling" that specifically excludes "[a]ny structure you own on your premises that is attached to your dwelling, other than another structure attached by a fence, utility line, or similar connection." (Doc. 7-1, p. 10.) As explained below, therefore, Gomez has not stated a claim for relief under the policy (Count I) or at law (Counts II and III). Even if Gomez had stated a claim under the policy, she has not stated a claim for bad faith under O.C.G.A. § 33-4-6 (Count IV), because the coverage decision was not in "bad faith" under the case law discussed below.

For the reasons provided below, Foremost's motion should be granted.

ARGUMENT AND CITATION TO AUTHORITY

A. Motion to Dismiss Standard

"[A] 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)). Under that standard, the factual allegations in the complaint must be enough "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Although courts must accept all well-pleaded facts as true, they are not required to accept a plaintiff's legal conclusions. *See Iqbal*. Further, the district court is authorized to consider documents included with a motion to dismiss that are central to the plaintiff's claim and referenced in the complaint. *See Brooks v. Blue Cross & Blue Shield,* 116 F.3d 1364, 1369 (11th Cir. 1997).

B. Gomez's has not stated a claim for relief under the Policy (Count I).

Under Georgia law, an insured "seeking coverage under a policy bears the burden to establish that he sustained a loss covered by the policy." *Elite Integrated Medical, LCC* [sic], *v. Hiscox, Inc.*, 553 F. Supp. 3d 1307, 1314 (N.D. Ga. 2021). In an insurance coverage dispute, "the Court begins by examining the source of coverage itself—the general promises of coverage made in the insurance policy." *Barrs v. Auto-Owners Ins. Co.*, 564 F. Supp. 3d, 1362, 1373 (M.D. Ga. 2021). As the explained in *Western Pacific Mutual Insurance Company v. Davies*, 267 Ga.

App. 675, 601 S.E.2d 363 (2004), "the court should give a term or phrase in the contract its ordinary meaning or common signification as defined by dictionaries, because they supply the plain, ordinary, and popular sense unless the words are terms of art." *Id*. at 678, 601 S.E.2d at 367,

The allegations in the Amended Complaint, included the photographs contained therein, do not support her claim for coverage under the terms of "Coverage A – Dwelling" in her policy. As indicated on the Declarations Page of her policy, Coverage A covers "dwellings shown on the Declarations Page," and "any structure you own on your premises **that is attached to your dwelling**, other than another structure attached by a fence, utility line, or similar connection" (emphasis added). (Doc. 7-1, p. 10.) The photos that are part of the Amended Complaint demonstrate that it is neither a "dwelling" nor attached to Gomez's dwelling. (Doc. 7-3.) Even if the structure is a "garage" as Gomez contends, it would not meet the dictionary definition that provides that plain and ordinary meaning of the term "dwelling." *See e.g.* https://www.dictionary.com/browse/dwelling (defining a "dwelling" as "a building or place of shelter to live in; place of residence; abode; home"); https://www.merriam-webster.com/dictionary/dwelling (defining a "dwelling" as "a shelter (such as a house) in which people live.")Thus, Gomez has not stated a claim for relief under the terms of the Policy.

C. Gomez has not stated a claim for promissory estoppel (Count II).

Promissory estoppel is not available as a remedy "where parties enter into a contract with bargained for consideration, the terms of which include the promises alleged in support of a promissory estoppel claim." *American Casual Dining, LP v. Moe's Southwest Grill, LLC*, 426 F. Supp. 2d 1356, 1371 (N.D. Ga. 2006). Thus, "[w]hen neither side disputes the existence of a valid contract, the doctrine of promissory estoppel does not apply, *even when it is asserted in the alternative*." Id. (emphasis added). See also *Beasley Forest Products v. Northern Clearing, Inc.*, 515 F. Supp. 3d 1367, 1377 (S.D. Ga. 2021) (same); *Blau v. Blau*, 368 Ga. App. 701, 707, 890 S.E.2d 50, 56-57 (2023) ("when parties enter into a contract, 'the consideration of which was a mutual exchange of promises, the promises were bargained for, *and so promissory estoppel is not present*") (citations omitted, emphasis added).

Here, Gomez cannot plead promissory estoppel in the alternative to her breach of contract claim because neither party disputes the existence or validity of the Policy. Specifically, Gomez states that "the Policy is a **binding contract** between the Parties" (emphasis added). (*Id.*, ¶ 27). Aside from the fact that Foremost agrees the policy is enforceable on its terms, Gomez goes several steps further and bases her promissory estoppel claim on the terms of the policy. (*Id.*, ¶¶ 40-44). Gomez has therefore not stated facts to support a promissory estoppel claim.

D. Gomez has not stated a claim for unjust enrichment (Count III).

As with promissory estoppel, "unjust enrichment applies when there is no legal contract and where there has been a benefit conferred which would result in an unjust enrichment unless compensated." *Smith Serv. Oil Co. v. Parker*, 250 Ga. App. 270, 272, 549 S.E.2d 485, 487 (2001). Construing Georgia law, the Eleventh Circuit has stated succinctly: "[r]ecovery on a theory of unjust enrichment … is only available 'when as a matter of fact there is no legal contract.'" *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F. 3d 1396, 1413 (11th Cir. 1998) (quoting *Regional Pacesetters, Inc. v. Halpern Enters. Inc.*, 165 Ga. App. 777, 782, 300 S.E.2d 180, 185 (1983)); *Tidikis v. Network for Med. Commc'n & Research, LLC*, 274 Ga. App. 807, 619 S.E.2d 481 (2005) (affirming dismissal of an unjust enrichment claim because the benefits sought were allegedly due under the contract); *American Casual Dining*, 426 F. Supp. 2d at 137 (finding a plaintiff cannot claim "that there was an agreement and that the [defendant] was unjustly enriched.")

In her Amended Complaint, Gomez cites her payment of premiums in accordance with the policy to support her claim for unjust enrichment in her effort to recover the policy's benefits for her claim. (Doc. 7, ¶¶ 47-51). As with her promissory estoppel claim, Gomez incorporates her allegation "the Policy is a binding contract between the Parties" into her unjust enrichment claim. (*Id.*, ¶¶ 27, 38). Gomez has therefore not stated facts to support an unjust enrichment claim.

E. Gomez has not stated a claim under O.C.G.A. § 33-4-6 (Count IV).

Under O.C.G.A. § 33-4-6, an insurer can be liable for up to 50% of a loss covered under a policy plus attorney's fees if it refused to pay a claim in "bad faith." *Lawyers Title Ins. Corp. v. Griffin*, 302 Ga. App. 726, 731, 691 S.E.2d 633, 637 (2010). To prevail on a claim for bad faith against an insurer, the insured must prove: "(1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to following suit, and (3) that the insurer's failure to pay was motivated by bad faith." *Lavoi Corp. v. Nat. Fire Ins. of Hartford*, 293 Ga. App. 142, 146, 666 S.E.2d 387, 391 (2008)

An insurer's refusal to pay its insured is not in bad faith if the claim is not covered under the policy. *Am. Reliable Ins. Co. v. Lancaster*, 356 Ga. App, 854, 860-61, 849 S.E.2d 697, 702 (2020); *see also Sky Harbor Atlanta Northeast, LLC v. Affiliated FM Ins. Co.*, 676 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2021) (holding an insured was not entitled to bad faith penalties under O.C.G.A. § 33-4-6 where it could not show that the policy provided coverage for the subject loss.) And even if a claim is covered by the policy, the insured must show that the insurer's refusal to pay was "frivolous and unfounded" to recover under the statute. *Lawyers Title Ins. Corp.*, 302 Ga. App. at 731, 691 S.E.2d at 637. *Lee v. Mercury Ins. Co. of Ga.*, 343 Ga. App. 729, 748, 808 S.E.2d 116, 133 (2017) (en banc) (finding penalties under O.C.G.A. § 33-4-6 "are not authorized where the insurance company *has any*

reasonable ground to contest the claim and where there is a disputed question of fact") (emphasis added).

As explained above, Gomez's claims are not covered under the terms of the Policy because the structure does not fall within the scope of Coverage A – Dwelling above. On that basis alone, the bad faith claim must be dismissed. At the very least, Foremost's decision that the structure is not a "dwelling" under the plain and ordinary definition of that term was neither "frivolous nor unfounded" so as to allow a recovery under the statute. *Montgomery v. Travelers Home and Marine Ins. Co.*, 360 Ga. App. 587, 594, 859 S.E.2d 130, 136 (2021) (precluding a finding of bad faith where the facts are in dispute).

F. Gomez cannot stated a claim under O.C.G.A. §§ 13-6-11 or 9-15-14 (Prayer for Relief, Paragraph F).

O.C.G.A. § 33-4-6 is the exclusive remedy for an insurer's refusal to pay a covered loss. *McCall v. Allstate Insurance Company*, 251 Ga. 869, 871, 310 S.E.2d 513, 515-16 (1984); *Howell v. Southern Heritage Ins. Co.*, 214 Ga. App. 536, 537, 448 S.E.2d 275, 276 (1994) (finding a claim for attorney fees and expenses of litigation under O.C.G.A. § 13-6-11 was not authorized because the penalties contained in O.C.G.A. § 33-4-6 are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds). Therefore, Gomez's prayers for relief under O.C.G.A. §§ 13-6-11 and 9-15-14 would relate, if at all, to the promissory estoppel and unjust enrichment claims. Because neither of those substantive claims are viable

(as explained above), Gomez could not recover under O.C.G.A. § 13-6-11 or § 9-15-14 as a matter of law. *Est. of Thornton ex rel. Thornton v. Unum Life Ins. Co. of Am.*, 445 F. Supp. 2d 1379, 1383 (N.D. Ga. 2006) (O.C.G.A. § 13-6-11); *Lee v. Park*, 341 Ga. App. 350, 353, 800 S.E.2d 29, 32 (2017) (O.C.G.A. § 9-15-14.) Both prayers are subject to dismissal at this time as a result.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Amended Complaint for failure to state a claim.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 7.1(D), that the foregoing **MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT** has been prepared in accordance with Local Rule 5.1(C) (Times New Roman font, 14 point).

This 31st day of May 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT** to the Clerk of Court using the CM/ECF system which will automatically send electronic mail notification of such filing to all attorneys of record who are CM/ECF participants:

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This 31st day of May 2024.

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