STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

PATRICIA JURCZAK and
JOHN F. JURCZAK, JR., her husband,

Intervening Plaintiffs,

and

Case No. 19-002111-CB

MOUNT GROUP, LLC, a Michigan Limited Liability Company; and MOUNT CLEMENS INVESTMENT GROUP, LLC, a Michigan Limited Liability Company,

Plaintiffs,

vs.

MACOMB ATHLETIC CLUB, INC., a Michigan Corporation; GENERAL CASUALTY COMPANY OF WISCONSIN; SMITH, SAWYER, SMITH, INC., and JOHN RINALDI,

Defendants.
_____/

OPINION AND ORDER

Currently before this Court is Defendant General Casualty Company of Wisconsin's ("General Casualty") motion for summary disposition as to the claims against it. Intervening Plaintiffs Patricia and John Jurczak ("Jurczaks") and Plaintiffs[1] have each filed a response in opposition to the motion.

[1] As an initial matter, Plaintiffs Mount Clemens Investment Group ("MCIG") and Mount Group are separate legal entities, but the exact relationship between the two companies is unclear. Plaintiffs claim that Mount Group is the parent company of MCIG, and the complaint initially states that MCIG owns the property in question and that Mount Group merely manages and operates the property for MCIG. However, although the lease agreement with Defendant Macomb Athletic Club ("MAC") attached to the complaint defines "Landlord" as only Mount Group and not MCIG, both entities now bring a claim of breach of contract arising out of that agreement against MAC. Also, the complaint later refers to both entities as the owner of the property, stating that "Mt. Group/MCIG, the Owner," entered into a property management agreement with Howard Realty Group ("HRG"). The management agreement attached to the complaint defines "Owner" as "Mount Group, LLC/Mount Clemens Investment Group, LLC," and this

I. Factual and Procedural History

This case has a complicated history involving multiple lawsuits. Plaintiffs own a shopping center in Mt. Clemens, Michigan. In June of 2014, Plaintiffs entered into a lease agreement with MAC, which operates a gym, for a term ending on August 31, 2024. The lease required MAC to secure liability insurance for the benefit of Plaintiffs, and MAC agreed to indemnify and hold Plaintiffs harmless for any liability arising out of MAC's use of the premises. However, Plaintiffs maintained responsibility for the exterior of the property, including parking lot maintenance.

In December of 2014, Plaintiffs entered into a property management agreement with HRG in which Plaintiffs hired HRG to manage, operate, control, rent, and lease the shopping center properties. Pursuant to the terms of the agreement, Plaintiffs appointed HRG as "his lawful agent and attorney-in-fact with full authority to do any and all lawful things necessary for the fulfillment of this Agreement . . .." The Agreement imposed a duty on HRG "to make or cause to be made all decorating, maintenance, alterations, and repairs to the property . . ." as well as "to sue and recover for rent and for loss or damage to any part of the property and/or furnishings thereof' and, when expedient, to compromise, settle and release any such legal proceedings or lawsuits." In exchange, Plaintiffs agreed to hold HRG harmless from "any and all claims, charges, debts, demands, and lawsuits, including attorney fees related to his management of the herein described property, and from any liability for injury on or about the property . . .." Upon execution, the Agreement automatically renewed every year on December 1st, unless terminated by either party by written notice 30 days prior to renewal.

Court notes that one person signed the agreement on behalf of both entities jointly as "Managing Member" of "Mt. Clemens Investment Group, LLC/Mount Group, LLC," which is again listed as "Property Owner." Overall, the majority of the complaint and the attached contracts from which the claims arise seem to treat the two entities as one and the same. Therefore, because this Court's review is restricted to the pleadings, for the purposes of this motion only this Court will also consider the two entities as one and refer to them jointly as Plaintiffs.

In October of 2016, Intervening Plaintiff Patricia Jurczak suffered an injury in the parking lot of the shopping center while participating in an exercise class offered by MAC in its normal course of business. In July of 2018, the Jurczaks filed a personal injury suit against Plaintiffs in front of this Court (Case No. 18-2492-NO), alleging that the negligently maintained parking lot surface was the proximate cause of Patricia Jurczak's fall. The Jurczaks only named Plaintiffs in the suit because, under the terms of the lease agreement with MAC, Plaintiffs retained the duty as property owner to maintain the parking lot.

Prior to the Jurczaks filing their complaint, Plaintiffs allegedly received notice of the impending lawsuit in early 2017 and forwarded the notice to HRG. After receiving the notice, HRG forwarded the information to Defendant John Rinaldi ("Rinaldi"). Rinaldi worked for Defendant Smith, Sawyer, and Smith, Inc. ("Smith"), an insurance agency that had procured an insurance policy through General Casualty on behalf of HRG. Rinaldi told HRG that General Casualty would only respond to an actual lawsuit.

After the Jurczaks filed their lawsuit, Plaintiffs did not file a response. Accordingly, a default was entered against Plaintiffs in that suit on August 9, 2018. The Jurczaks moved for a default judgment on October 29, 2018, and the Court granted the motion and entered a default judgment against Plaintiffs in the personal injury suit on November 11, 2018. On February 15, 2019, Plaintiff filed a motion to set aside that default judgment, claiming excusable neglect and good cause because they thought General Casualty was handling the claim. This Court denied the motion to set aside on April 3, 2019.

Subsequently, on May 31, 2019, Plaintiffs filed their complaint in the instant lawsuit. Specifically, as it relates to the motion currently before this Court, the complaint alleges claims for breach of contract and bad-faith failure to settle against General Casualty. Plaintiffs allege that

General Casualty issued both Plaintiffs and HRG an insurance policy through Smith and Rinaldi, so General Casualty had a contractual duty to defend Plaintiffs in the underlying personal injury lawsuit. On July 22, 2019, General Casualty filed its current motion for summary disposition. Smith filed a response to the motion on August 29, 2019, Plaintiffs filed a response on September 3, 2019, and General Casualty filed a reply to the response on September 5, 2019.

II. Standard of Review

A court may grant summary disposition under MCR 2.116(C)(8) if "[t]he opposing party failed to state a claim on which relief can be granted." A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). When deciding a motion under (C)(8), the Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

III. Arguments

General Casualty argues that Plaintiffs are not named insureds on the relevant insurance policy and that Plaintiffs are also not covered under the blanket additional insured endorsement attached to the policy. General Casualty asserts that the endorsement extends additional insured coverage only to other persons or organizations when HRG, the named insured, and such person or organization agreed in writing in a contract or agreement that such person or organization be added as an additional insured. According to General Casualty, there is no such written agreement or contract in this case. Therefore, because Plaintiffs are not parties to the contract, General

Casualty argues that Plaintiffs cannot bring a claim of breach of contract against General Casualty. Similarly, General Casualty also argues that Plaintiffs cannot state a viable claim for bad faith failure to settle because insurers only owe their insureds a high standard of good faith.

In response, Plaintiffs assert that the email chains attached to the complaint constitute a written agreement between HRG and Plaintiffs to have Plaintiffs added as an additional insured to the insurance policy General Casualty issued to HRG. Further, Plaintiffs argue that the emails establish Plaintiffs as third-party beneficiaries to the policy, which allows Plaintiffs to bring a claim for breach of contract. In regards to the claim for bad faith failure to settle, Plaintiffs again assert that they are insured under the policy, so General Casualty acted in bad faith when it refused to settle the underlying personal injury claim against Plaintiffs.

IV. Law and Analysis

First, Plaintiffs bring a claim for breach of contract against General Casualty. Because this is a contract-based action, the contract attached to the complaint is part of the pleadings and can be considered when determining the legal sufficiency of the complaint pursuant to MCR 2.116(C)(8). See *Liggett Rest Grp, Inc v City of Pontiac*, 260 Mich App 127, 133 (2003). Here, Plaintiffs base their claims against General Casualty on the insurance policy issued to HRG, so this Court will consider the policy as part of the pleadings when deciding the current motion.

"An insurance policy is a contract that should be read as a whole to determine what the parties intended to agree on." *McKusick v Travelers Indem Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). When interpreting a contract, the Court's "primary obligation is to give effect to the parties' intention at the time they entered into the contract." *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). "The contract language will be given its ordinary and plain meaning, rather than a technical or a strained construction." *Wilson v Home Owners*

Mut Ins Co, 148 Mich App 485, 490; 384 NW2d 807 (1986). The Court must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 330; 894 NW2d 673 (2016).

"An insurance policy is a contractual agreement between the insured and the insurer." *Farm Bureau Ins Co v TNT Equipment, Inc*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 343307); slip op at 2. Here, the insurance policy clearly does not list Plaintiffs as a named insured. HRG purchased the insurance policy from General Casualty through Smith, and Plaintiffs were not party to the policy. Further, the plain language of the policy does not expressly grant Plaintiffs the right to enforce the policy even though they are not named insureds. Therefore, Plaintiffs have no express contractual rights under the policy and are not entitled to bring a breach of contract claim as a named insured or party to the contract.

Plaintiffs, however, argue that they are entitled to enforce the policy as "additional insureds." "An additional insured is defined generally as someone who is covered by an insurance policy but who is not the primary insured. An additional insured may, or may not, be specifically named in the policy." *Id*., slip op at 3 (internal quotations omitted). Here, the policy includes an endorsement for additional insureds, which states, in relevant part, "Paragraph C. Who is Insured in Section II – Liability [i]s amended to include as an additional insured any person or organization when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." Plaintiffs claim that the email chain attached to the complaint reveals that HRG agreed to have Plaintiffs insured under the policy. However, Plaintiffs do not allege that the emails contain an actual written agreement or contract. Therefore, unlike the insurance policy, the emails are not part of the

pleadings and cannot be considered for the purposes of this motion. See MCR 2.113(C), MCR 2.110(A), and *Yaldo v North Pointe Ins Co*, 217 Mich.App 617, 621; 552 NW2d 657 (1996) (defining " 'written instrument' as 'something reduced to writing as a means of evidence, as the means of giving formal expression to some act or contract' " and an "instrument" as " 'a formal legal document as a contract, deed or grant' "). Furthermore, Plaintiffs do not attach a "written agreement or contract," as required by the endorsement, to their complaint and do not allege that such a written agreement or contract even exists. Consequently, by the express terms of the policy and attached endorsement, Plaintiffs have not properly alleged that they are entitled to enforce the policy as "additional insureds."

Finally, Plaintiffs claim that they are entitled to enforce the policy as third-party beneficiaries. Michigan law allows certain nonparties to a contract to sue to enforce the contract as a third-party beneficiary if the contract establishes that "a promisor has undertaken a promise directly to or for that nonparty." *Farm Bureau*, slip op at 3. Here, the insurance policy does not mention Plaintiffs and does not expressly state that HRG obtained the policy for the benefit of anyone else. The policy only contains promises General Casualty made to HRG and does not contain any reference to any promises made to or for the benefit of Plaintiffs. Plaintiffs again claim that the blanket insured provision expressly indicates that General Casualty promised HRG that it would provide coverage to any person or organization HRG agreed to add. However, as stated previously, Plaintiffs have not provided the required written instrument to indicate that HRG agreed to add Plaintiffs as additional insureds. Therefore, because Plaintiffs are not additional insureds, General Casualty did not expressly agree to provide coverage for the benefit of Plaintiffs. In other words, Plaintiffs cannot enforce the contract because the policy does not identify Plaintiffs as an intended beneficiary.

Overall, Plaintiffs' complaint does not establish entitlement to enforce the contract as a direct insured, additional insured, or third-party beneficiary. Therefore, Plaintiffs have failed to state a claim for breach of contract upon which relief can be granted.

Similarly, only insureds may bring a claim against an insurer for acting in bad faith in refusing to settle. See *J&J Farmer Leasing, Inc v Citizens Ins Co of America*, 472 Mich 353, 356 n 3; 696 NW2d 681 (2005). As established above, Plaintiffs' complaint does not establish that Plaintiffs are insureds under the policy issued by General Casualty to HRG. Therefore, Plaintiffs cannot legally bring a claim for bad-faith in refusing to settle against General Casualty.

V. Conclusion

For the reasons stated above, General Casualty's motion is GRANTED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

COUNTY OF MACOMB • STATE OF MICHIGAN •

HON. JAMES M. MACERONI P61759
Circuit Court Judge

/S/ JAMES MACERONI
CIRCUIT COURT JUDGE, P61759

Date: September 27, 2019
JMM/aes