

2015 WL 11120532

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United States District Court,  
N.D. Texas, Dallas Division.

Kenneth Graber, Plaintiff,

v.

State Farm Lloyds, Defendant.

CIVIL ACTION NO. 3:13-CV-2671-B

Signed 08/06/2015

#### Attorneys and Law Firms

Scott G. Hunziker, Bill L. Voss, Charles Bryan Beverly, The Voss Law Firm PC, The Woodlands, TX, for Plaintiff.

Christopher W. Martin, Ryan K. Geddie, Martin Disiere Jefferson & Wisdom LLP, Dallas, TX, for Defendant.

#### **ORDER DENYING STATE FARM'S MOTION FOR RECONSIDERATION**

JANE J. BOYLE, UNITED STATES DISTRICT  
JUDGE

\*1 Before the Court is Defendant State Farm's Motion for Reconsideration, filed July 15, 2015. Doc. 66. By its motion, State Farm asks the Court to reconsider its decision to deny State Farm's requests for summary judgment on Plaintiff's prompt payment and statutory misrepresentation claims and enter summary judgment on its behalf. For the reasons that follow, the Court concludes that the motion should be, and hereby is, **DENIED**.

#### I.

#### BACKGROUND

On June 15, 2015, the Court granted State Farm's Motion for Summary Judgment in this insurance dispute with respect to Plaintiff's breach of contract, common law and statutory bad faith claims, but

denied State Farm's motion as it pertained to Plaintiff's claims under section 541.061 of the Insurance Code, sections 17.50(a)(1) and (3) of the Deceptive Trade Practice Act ("DTPA"), and Chapter 542 of the Insurance Code, commonly referred to as the Texas Prompt Payment of Claims Act ("TPPCA"). Doc. 62, Mem. Op. & Order ("Order"). Thereafter, on July 15, 2015, State Farm filed the instant motion seeking reconsideration of the Court's decision denying State Farm's requests for summary judgment on Plaintiff's TPPCA, section 541.061, and section 17.50(a)(1) claims. Doc. 66, Mot. for Reconsideration.

#### II.

#### LEGAL STANDARD

Rule 59(e) provides for a court's alteration or amendment of a judgment upon a party's timely motion. A judgment may appropriately be altered or amended under Rule 59(e) to correct a manifest error of law, to account for newly discovered evidence, or to accommodate an intervening change in controlling law. *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). Rule 59(e) motions "should not be used to relitigate prior matters that should have been urged earlier or that simply have been resolved to the movant's dissatisfaction." *Sanders v. Bell Helicopter Textron, Inc.*, No. 4:04-CV-254-Y, 2005 WL 6090228, at \*1 (N.D. Tex. Oct. 25, 2005). Accordingly, the Rule 59(e) remedy is extraordinary and should be used sparingly. *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

#### III.

#### ANALYSIS

##### *A. Plaintiff's Prompt Payment Claim*

State Farm first moves the Court to reconsider its decision denying State Farm's request for summary judgment on Plaintiff's claim for statutory interest under the TPPCA. In support of its motion for summary judgment, State Farm argued

that its full and timely payment of the appraisal award precluded Plaintiff from recovering statutory interest under the TPPCA and entitled it to summary judgment as a matter of law. Doc. 52, Def.'s Br. 9–10. Relying, in part, on the Fifth Circuit's decision in *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997), the Court rejected this argument as “without basis in the text of the TPPCA or the Texas Supreme Court and Fifth Circuit decisions construing the Act” and denied State Farm's request. Order 16. State Farm now asks the Court to reconsider that decision and provides the Court with three grounds for doing so.

\*2 **First**, State Farm argues that the Court erred in holding that State Farm could be held liable for statutory interest under the TPPCA absent liability for breach of contract. Mot. for Reconsideration 2–3. According to State Farm, the Court's reliance on *Higginbotham* is misplaced because the insurer in that case was found liable for failing to pay the insured's claim, whereas State Farm was never adjudged liable for Plaintiff's claim. *Id.* Instead, State Farm draws the Court's attention to the Fifth Circuit's recent decision in *Tremago, L.P. v. Euler-Hermes Am. Credit Indem. Co.*, 602 Fed.Appx. 981 (5th Cir. Feb. 25, 2015), in which the Court held that an insurer could not be made to pay statutory penalty interest under the TPPCA, because the insurer “ha [d] never been found liable for breach of contract, nor will it ever face such a liability determination because the breach of contract claim was settled ....” *Id.* at 3 (quoting *Tremago*, 602 Fed.Appx. at 983). What State Farm fails to appreciate, however, is that liability for the claim—the kind of liability required for there to be TPPCA liability—is not necessarily the same as liability for breach of contract.

The TPPCA requires an insurer to pay an insured's claim not later than 60 days after receiving all items, statements, and forms reasonably requested and required. Tex. Ins. Code § 542.058. An insurer who fails to fully and timely pay a claim for which it is liable must pay interest on the unpaid portions of the claim at a rate of 18 percent a year. *Id.* § 542.060; *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427–28. The statute is

to be “liberally construed to promote the prompt payment of insurance claims.” *Id.* § 542.054.

As the statute makes clear, liability for the claim is a precondition to liability under the TPPCA. *Wellisch*, 75 S.W.3d at 57 n.2 (citing *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001), *modified on other grounds*, 2001 WL 1412951, at \*1 (Tex. June 21, 2001)); *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 861 (5th Cir. 2003) (“The sole basis for finding liability under [the TPPCA], then, is that the requisite time has passed and the insurer was ultimately found liable for the claim.”). In many cases, such as *Higginbotham*, an insurer's liability for the claim and its liability for breach of the insurance contract in a subsequent lawsuit will be one in the same, because the plaintiff's breach of contract claim is based on the insurer's wrongful denial of the claim. 103 F.3d at 461. In other cases, however, these two types of liability will differ because the plaintiff's breach of contract claim is based on something other than the insurer's wholesale denial of the claim.

This case belongs to the latter category of cases where the two types of liability diverge. In this case, State Farm accepted Plaintiff's claim for hail damage to his property by acknowledging that at least some of the damage caused by the hail storm was covered under Plaintiff's policy. Def.'s Ex. B-1, Letter Enclosing Payment of Claim, App. 55–56 (“State Farm agrees there is covered damage caused by hail to the areas which we have itemized in our estimate.”). State Farm estimated the replacement cost value of those items at \$3,343.96 and, after accounting for Plaintiff's deductible and depreciation, issued him a check for \$729.64. *Id.* Determining this amount to be inadequate to cover the damage to his property, Plaintiff demanded appraisal to determine the scope of his loss and filed suit against State Farm for what he perceived to be State Farm's underpayment of his claim. Although State Farm's timely payment of the resulting appraisal award estopped Plaintiff from relying on the appraisal award to prove that State Farm's initial underpayment amounted to a breach of his policy, it does not change the fact that State Farm accepted liability for at least part

of Plaintiff's claim when it issued Plaintiff a letter indicating that "State Farm agrees there is covered damage caused by hail to the areas which we have itemized in our estimate." *Id.* As such, State Farm may be held liable under the TPPCA to the extent that it failed to timely pay the full amount of those items of damage for which it accepted liability.<sup>1</sup>

\*3 **Second**, State Farm objects to the Court's reliance on language in State Farm's October 3, 2014 letter issuing payment of the appraisal award as evidence that it accepted liability for Plaintiff's claim.<sup>2</sup> Mot. for Reconsideration 3–4. According to State Farm, while it previously agreed there was covered damage to the roof, the cause of all of the roof damage was in dispute and it expressly reserved and did not waive its right to challenge causation and the coverage in the letter. *Id.* at 4. Thus, State Farm contends, its letter should not be read as an admission of liability for Plaintiff's claim. *Id.*

Contrary to State Farm's contention, however, the Court has not held that State Farm may be held liable under the TPPCA for failing to timely pay for "all" of the damage to Plaintiff's property, only those items included in its initial estimate and for which it has admitted liability. Although it appears from State Farm's letter issuing payment of the appraisal award that State Farm admits coverage for all of the items appraised, the Court accepts that there may have been items included in the appraisal award that were not included in State Farm's initial estimate for which State Farm has not admitted liability. The Court leaves this issue for the jury to decide.

**Third**, State Farm contends that the Court's opinion wrongfully assumes that State Farm did not comply with the TPPCA because it delayed payment of the amount of loss as set by the appraisal process. Mot. for Reconsideration 5. According to State Farm, "[u]ntil the contractually-invoked appraisal process set the amount of loss, the amount was in disagreement and in the process of being contractually set by appraisal. In that sense, the appraisal award is the functional equivalent of an 'item' required before payment is made under section 542.058." *Id.* Because State Farm paid the Plaintiff the appraisal award within the 60 days

contemplated by section 542.058 and within five business days of notifying Plaintiff of its decision to pay the appraisal award as required by section 542.057, State Farm claims that it did not violate the TPPCA. *Id.* The Court disagrees.

It is beyond dispute that State Farm agreed to pay for certain items of damage claimed by Plaintiff on July 17, 2012. Def.'s Ex. B-1, Letter Enclosing Payment of Claim, App. 55–56 ("State Farm agrees there is *covered damage caused by hail* to the areas which we have itemized in our estimate.") (emphasis added); Def.'s Ex. B-9, Letter Issuing Appraisal Payment, App. 80–81 ("According to the [appraisal] award, the cost to repair or replace those items of damage that *State Farm has determined are covered by the Homeowners policy* is \$12,898.59.") (emphasis added). Therefore, under section 542.057, State Farm had five business days, or until July 24, 2012, to fully pay Plaintiff for these items. In addition, State Farm had 60 days under section 542.058 from the date it received "all items, statements, and forms" it required and requested from Plaintiff to fully pay Plaintiff's claim.<sup>3</sup> The summary judgment evidence strongly suggests, however, that State Farm did not fully pay Plaintiff's claim until October, 3, 2014, when it paid the appraisal award. Def.'s Ex. B-9, Letter Issuing Appraisal Payment, App. 80–81 ("According to the [appraisal] award, the cost to repair or replace those items of damage that *State Farm has determined are covered by the Homeowners policy* is \$12,898.59.") (emphasis added). Accordingly, the Court concludes that, at the very least, there is a triable issue of material fact as to whether State Farm violated the TPPCA.

#### *B. Plaintiff's Statutory Misrepresentation Claims*

\*4 State Farm next moves the Court to reconsider its decision denying State Farm's request for summary judgment on Plaintiff's claims under section 541.061 of the Insurance Code and section 17.50(a)(1) of the DTPA. Plaintiff asserts that State Farm violated section 541.061 of the Insurance Code and section 17.50(a)(1) of the DTPA by misrepresenting to Plaintiff that the hail damage to his house would be covered under the Policy and that State Farm's adjusters were "unbiased."

Doc. 15, Second Am. Compl. ¶¶ 26–30, 37. In its motion for summary judgment, State Farm assumed that Plaintiff's statutory misrepresentation claims were based on the same underlying theory of liability as his "statutory bad faith" claims under section 541.060 of the Insurance Code and section 17.50(a)(4) of the DTPA (i.e., unreasonable investigation of Plaintiff's claim) and, therefore, failed for the same reason (i.e., Plaintiff's failure to establish independent injury). Def.'s Br. 7–9. However, as the Court observed in denying State Farm's request for summary judgment, "Section 541.061 contemplates ... situations where a carrier represents 'specific circumstances' which will be covered and subsequently denies coverage,' whereas Section 541.060 targets unfair settlement practices in the insurance industry." Order 13. Therefore, the Court concluded that State Farm had not met its summary judgment burden of showing that no genuine issue of fact exists or that it is entitled to judgment as a matter of law with regard to these claims. *Id.*

State Farm urges the Court to reconsider its decision on the grounds that Plaintiff's allegations are legally insufficient to constitute actionable misrepresentations under section 541.061 and section 17.50(a)(1). Mot. for Reconsideration 6. According to State Farm, its alleged misrepresentation regarding Plaintiff's coverage is not actionable because it never stated that hail damage is not covered and because it paid Plaintiff for his hail damage. *Id.* Further, State Farm contends that its alleged misrepresentation regarding unbiased adjusters is mere puffery rather than an actionable representation of material fact. *Id.* Also, and alternatively, State Farm asks the

Court to dismiss Plaintiff's claims because Plaintiff has not sufficiently pleaded his misrepresentation claims under Rules 8 and 9. *Id.* at 6–7.

The Court acknowledges that Plaintiff's statutory misrepresentation claims are of dubious validity and lacking in specificity. However, State Farm had the opportunity to raise these deficiencies in a motion to dismiss or in its motion for summary judgment, but failed to do so.<sup>4</sup> State Farm does not suggest that in denying State Farm's request for summary judgment on Plaintiff's statutory misrepresentation claims the Court erred in applying the law, submit newly discovered evidence, or point to an intervening change in the controlling law. Thus, the Court perceives no basis for reconsidering its decision. *See Schiller*, 342 F.3d at 567.

#### IV.

#### CONCLUSION

For the aforementioned reasons, the Court stands by its decision to deny State Farm's request for summary judgment on Plaintiff's prompt payment and statutory misrepresentation claims and **DENIES** State Farm's Motion for Reconsideration (doc. 66).

**SO ORDERED.**

All Citations

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#### Footnotes

- 1 *Tremago* is not to the contrary, because in *Tremago*, the insurer did not accept liability for the insured's claim as State Farm did here. 602 Fed.Appx. at 983.
- 2 Specifically, State Farm objects to the Court's reliance on the sentence: "According to the award, the cost to repair or replace those items of damage that State Farm has determined are covered by the Homeowners policy is \$12,898.59." Def.'s Ex. B-9, Letter Issuing Appraisal Payment, App. 80–81.
- 3 The Court is unable to determine this date from the summary judgment evidence before it. However, the Court finds no legal support for State Farm's argument that "the appraisal award is the functional equivalent of an 'item' required before payment is made under section 542.058."
- 4 It is true that State Farm challenged the legal and factual sufficiency of Plaintiff's allegations in a motion to dismiss (doc. 19), but this motion was denied as moot and State Farm did not refile the motion until after

the Court ruled on State Farm's motion for summary judgment, at which point it was untimely. See docs. 37, 69–70.

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