IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RANDALL BLUELL and HASTINGS MUTUAL INSURANCE CO.,

Plaintiffs,

OPINION AND ORDER

01-C-0538-C

v.

ALL AMERICAN HOMES, INC. and WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

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This is a civil action for monetary relief in which plaintiffs Randall Bluell and Hastings Mutual Insurance Co., are suing defendants All American Homes Inc., and Westchester Fire Insurance Company for negligence and strict liability. Plaintiffs assert that defendant All American's negligence relating to the lift plate portion of a roof it manufactured and the defective condition of the lift plate itself were substantial factors in causing the personal injuries sustained by plaintiff Bluell during the course of his employment. Jurisdiction is present in this case; the parties are of diverse citizenship and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332 (a)(1).

Presently before the court is defendant Westchester's motion to dismiss Count II (strict liability) of the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendant Westchester argues that plaintiffs cannot maintain a cause of action against it under the Wisconsin Direct Action Statute, Wis. Stat. § 632.24, or the Wisconsin Permissive Joinder Statute, Wis. Stat. § 803.04. Because Wis. Stat. § 803.04(2)(a) and the case law supports permissive joinder, I will deny Westchester's motion to dismiss Count II (or, more accurately, its motion for judgment on the pleadings) of plaintiffs' amended complaint.

For the sole purpose of deciding this motion, plaintiff Bluell's allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

Plaintiff Randall Bluell is a Wisconsin resident. Plaintiff Hastings Mutual Insurance Co. is an insurance company with its principal place of business in Hastings, Michigan. Defendant All American Homes, Inc., more accurately known as All American Homes of Iowa, LLC, manufactures and distributes modular homes. Defendant All American is licensed to do business in Wisconsin and its principal place of business is in Dyersville, Iowa. Defendant Westchester Fire Insurance Company is also licensed to do business in Wisconsin and its principal place of business is in Atlanta, Georgia.

On July 22, 1999, plaintiff Bluell was injured on the job in Juneau County,

Wisconsin. Plaintiff Bluell was injured severely and permanently when the lift plate portion of a roof manufactured by defendant All American failed, causing a section of the roof to fall onto his leg. At the time plaintiff Bluell was injured, defendant Westchester insured defendant All American for liability resulting from negligence and product liability and plaintiff Hastings insured Bluell's employer (Creative Builders, Inc.) for workers' compensation. As a result of the accident, plaintiff Hastings paid workers' compensation benefits to plaintiff Bluell.

OPINION

A. Standard of Review

As a preliminary matter, plaintiff Bluell questions whether defendant's motion to dismiss is actually a motion for judgment on the pleadings because defendant Westchester has filed an answer. When an answer has been submitted, the proper motion is a motion for a judgment on the pleadings. See Fed. R. Civ. P. 12(c). However, a motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss. See Flenner v. Sheahan, 107 F.3d 459, 461 (7th Cir. 1997) ("the motion is not granted unless it appears beyond doubt that the plaintiff can prove no facts sufficient to support his claim for relief, and the facts in the complaint are viewed in the light most favorable to the non-moving party"); Frey v. Bank One, 91 F.3d 45, 46 (7th Cir. 1996); Thomason v. Nachtrieb, 888

F.2d 1202, 1204 (7th Cir. 1989). The only difference between a Rule 12(b)(6) motion and a Rule 12(c) motion is that on a Rule 12(c) motion, the court considers the answer as well as the complaint. Therefore, the question is whether defendant Westchester filed an answer. Both defendants answered all counts of plaintiffs' amended complaint. See Answer, dkt. #8. Curiously, defendant Westchester answered again, but this time only as to Count I (negligence). See Answer, dkt. #16. Because defendant Westchester answered the complaint in full, I construe its motion to dismiss as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c).

Plaintiffs also assert that the motion for judgment on the pleadings must be converted to a motion for summary judgment because a matter outside the pleadings (an insurance policy) was presented to the court. Ordinarily, when a party submits evidentiary materials outside the pleadings in connection with a motion to dismiss, the court is required to notify the parties if it intends to consider the evidentiary matter and permit the parties to develop the motion as one for summary judgment under Fed. R. Civ. P. 56. See General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997). However, in this case it is unnecessary to convert the motion into one for summary judgment because I did not consider any evidence outside the pleadings.

B. Direct Action versus Permissive Joinder

Defendant Westchester has filed a motion for judgment on the pleadings as to plaintiffs' strict liability claim (Count II) only. Defendant Westchester argues that plaintiffs must satisfy the requirements of both the direct action and permissive joinder statutes. (Given defendant Westchester's posture that plaintiffs need to satisfy the requirements of both statutes to maintain a cause of action, it is odd that defendant Westchester did not file a motion to dismiss the negligence claim (Count I) as well.)

In Wisconsin, there are two possible theories of recovery against defendant Westchester: direct action against the insurer under Wis. Stat. § 632.24 or permissive joinder under Wis. Stat. § 803.04(2)(a). Under the direct action statute, "[a]ny bond or policy of insurance covering liability to others for negligence makes the insurer liable . . . to the persons entitled to recover against the insured." Wis. Stat. § 632.24. However, Wis. Stat. § 631.01(1) limits the application of Wis. Stat. § 632.24 to insurance policies "delivered or issued for delivery in this state."

Plaintiff Bluell does not deny defendant Westchester's assertion that the policy was delivered or issued for delivery outside Wisconsin. Nevertheless, the issue of where the policy was delivered or issued for delivery is irrelevant because plaintiff Bluell can maintain a cause of action against defendant Westchester under the permissive joinder statute. See Wis. Stat. § 803.04(2)(a). This statute states in part:

In any action for damages caused by negligence, any insurer which has an

> interest in the outcome of such controversy adverse to the plaintiff . . . is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

Wis. Stat. § 803.04(2)(a).

Defendant Westchester is correct when it states that to maintain a direct action, both the procedural requirements in the direct action statute and the substantive requirements in the permissive joinder statute need to be met. Kenison v. Wellington Insurance Co., 218 Wis. 2d 700, 704, 582 N.W.2d 69, 71 n.2 (Wis. Ct. App. 1998); see also Decade's Monthly Income & Appreciation Fund v. Whyte & Hirschboeck, 173 Wis. 2d 665, 678, 495 N.W.2d 335, 340 (Wis. 1993). However, defendant Westchester fails to distinguish a direct action from a permissive joinder. Both concepts may result in a cause of action against an insurer, but permissive joinder does not require the policy to be issued or delivered in Wisconsin if the accident, injury or negligence occurred here and the insured is also a party. In this case, plaintiffs have sued both the insurer (defendant Westchester) and the insured (defendant All American), and the accident occurred in Wisconsin.

It is not necessary for plaintiff Bluell to meet the requirements of both statutes in order to permissively join defendant Westchester. In Kenison, the Wisconsin Court of Appeals stated explicitly, "[i]f the accident, injury or negligence occurs in Wisconsin, and the

insurance policy was issued or delivered outside Wisconsin, although a plaintiff may not pursue the insurer directly because of the § 631.01(1), Stats., limitation, he or she may *join* the insurer as a proper party defendant provided that the insured is also a party." Kenison, 218 Wis. 2d at 710, 582 N.W.2d at 73 (emphasis in original). The Court of Appeals for the Seventh Circuit also clarified what is needed to fall under the permissive joinder statute in Utz v. Nationwide Mutual Insurance Co., 619 F.2d 7, 9 (7th Cir. 1980), in which it stated that, "in order to join an insurance company in the action, the accident must have occurred in Wisconsin, or the insurance policy must have been issued or delivered in Wisconsin." Therefore, to permissively join an insurer, a plaintiff with an insurance policy delivered or issued outside Wisconsin need show only that the accident occurred in Wisconsin and that the insured is also a party to the lawsuit.

The facts alleged by plaintiff Bluell meet the requirements for permissive joinder of defendant Westchester under Wis. Stat. § 803.04(2)(a). First, the injury occurred in Juneau County, Wisconsin. Second, the insured, defendant All American, is also a party to the lawsuit.

Defendant argues that plaintiffs can maintain a cause of action for negligence, but not strict liability. Although it is true that the permissive joinder statute also requires that the cause of action be for "damages caused by negligence" (Wis. Stat. § 803.04(2)(a)), defendant Westchester's argument is inconsistent with Wisconsin case law interpreting this statute.

In Barter v. General Motors Corp., 70 Wis. 2d 796, 802-03, 235 N.W.2d 523, 526 (Wis. 1975), the Wisconsin Supreme Court stated that "[a] cause of action for strict liability falls within the ambit of language of [Wis. Stat. § 803.04(2)(a)] as a lawsuit for negligence." Therefore, defendant Westchester's argument that the permissive joinder statute is inapplicable to a strict liability claim is unpersuasive.

Because plaintiff Bluell has met all of the requirements for permissive joinder of defendant Westchester under Wis. Stat. § 803.04(2)(a), I will deny Westchester's motion for judgement on the pleadings as to Count II (strict liability) of plaintiffs' amended complaint.

ORDER

IT IS ORDERED that defendant Westchester Fire Insurance Company's motion for a judgment on the pleadings to Count II of plaintiffs' amended complaint is DENIED.

Entered this 29th day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge