IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSEPH BURNETT and
TAMMY BURNETT,

Plaintiffs,

v.

COUNTRY MUTUAL INSURANCE
COMPANY,

Defendant.

OPINION AND ORDER

12-cv-0019-slc

This case involves a claim by homeowners against their insurer after a tornado extensively damaged their home on April 10, 2011. Plaintiffs Joseph and Tammy Burnett brought claims in the Circuit Court for Lincoln County for breach of contract and bad faith against the insurer, defendant Country Mutual Insurance Company. On January 6, 2012, defendant removed the case to this court, asserting diversity under 28 U.S.C. § 1332 as the basis for federal jurisdiction.

Three motions are before the court: 1) defendant's motion for a retroactive extension of its deadline for answering or otherwise defending against the complaint, dkt. 15; 2) plaintiffs' motion for default judgment, dkt. 10; and 3) defendant's motion to stay, dkt. 9. As explained below, I am excusing defendant's failure to timely file its motion for a stay, granting that stay, and denying plaintiffs' motion for default.

I find the following facts solely for the purpose of deciding this set of motions:

FACTS

On April 10, 2011, a tornado damaged plaintiffs' home and outbuildings located at N3003 Maplewood Road, Merrill, Wisconsin. Plaintiffs timely filed a claim under their homeowner's insurance policy, which was issued by defendant Country Mutual Insurance Company. On April 18, 2011, defendant paid plaintiffs $38,282.94 based on its inspection of the damage to the home and outbuildings, but notified plaintiffs that some of the drywall in the home would have to be

removed (at defendant's expense) in order to determine if the tornado had damaged the foundation. In a series of letters exchanged between October and December 2011, plaintiffs' counsel informed defendant that in plaintiffs' view, the damage to the premises rendered it a "constructive total loss" which triggered defendant's obligation to pay the policy limits and which rendered the removal of drywall unnecessary. Defendant disagreed and insisted that further inspection of the foundation was necessary. Plaintiffs also demanded that defendant reimburse them for additional living expenses that they had incurred, which defendant resisted.

On or about November 9, 2011, the Town of Merrill building inspector issued a raze order for the property. Plaintiffs informed defendant that in their view, the raze order was presumptive proof that repairs to the dwelling were unreasonable and that the dwelling should be deemed a constructive total loss under Wisconsin's "valued policy law", Wis. Stat. § 632.05.[1] Plaintiffs again demanded that defendant pay the policy limits. Defendant maintained its position that further inspection was necessary.

On October 7, 2011, plaintiffs filed a civil complaint in the Circuit Court for Lincoln County, alleging that defendant had breached the terms of the policy by failing, refusing or delaying payment for damages claimed and that its actions constituted bad faith. Complaint, dkt. 3, exh. A. They served defendant with the complaint on December 21, 2011. On January 6, 2012, defendant removed the case to this court.

On January 23, 2012, before filing an answer, defendant moved to stay this case on the ground that plaintiffs' claims were not ripe. Defendant asserted that it had not yet denied plaintiffs' claim but was still investigating it. According to defendant, it still had to complete an

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[1]Wis. Stat. § 632.05(2) provides:

> **2) Total loss.** Whenever any policy insures real property that is owned and occupied by the insured primarily as a dwelling and the property is wholly destroyed, without criminal fault on the part of the insured or the insured's assigns, the amount of the loss shall be taken conclusively to be the policy limits of the policy insuring the property.

inspection of plaintiffs' property in order to determine the nature, cause and scope of the damages sustained. Defendant also asserted that it needed to investigate whether plaintiffs have a legitimate claim for additional living expenses, and if so, the amount of that claim. In the alternative, defendant asked that the case be dismissed without prejudice. Dkt. 9.

On January 30, 2012, plaintiffs filed a brief in opposition, simultaneously with a motion for entry of default. The latter motion was brought on the ground that defendant had failed to file an answer to the complaint within the deadline prescribed by Fed. R. Civ. P. 81(c). The next day, defendant filed a motion seeking a *nunc pro tunc* extension of time to file its motion to stay, citing excusable neglect under Fed. R. Civ. P. 6(b). According to defendants' lawyers, their delay was the result of a busy workload, namely, the preparation of a document production response in one case and trial preparation in another. Dkt. 15, at 3-4.

OPINION

I. Defendant's Motion for Extension of Time and Plaintiffs' Motion for Default

Fed. R. Civ. P. 81(c)(2)(C) provides that a defendant who did not answer a complaint before removal "must answer or present other defenses or objections under these rules" within 7 days after the notice of removal is filed. Defendant filed the notice of removal in this case on January 6, 2012; because it had not yet answered the complaint, its answer was due in this court on January 13, 2012. Defendant concedes that it missed this deadline. Citing Fed. R. Civ. P. 6(b), defendant asks the court to retroactively grant it an extension of its deadline until January 23, 2012, which is the date on which it filed its motion to stay.

As a starting point, plaintiffs correctly point out that a "motion to stay" is not a motion contemplated by the Federal Rules of Civil Procedure as one that can be made before a responsive pleading is filed. *See* Fed. R. Civ. P. 12(b). However, when construing a motion, the court may determine its nature by its substance or the relief it seeks as opposed to simply looking at its title

or caption. 56 Am. Jur. 2d Motions, Rules, and Orders § 3 (2010). *See also, Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, fn. 10 (1990) citing *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir. 1984) ("The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) ("The court will construe [a motion], however styled, to be the type proper for the relief requested"). Here, defendant argued in its motion that plaintiffs filed their suit prematurely, explaining that defendant had not completed its investigation or reached a final decision with regard to plaintiffs' claim. Although defendant's proposed relief was a stay, it asked in the alternative that the complaint be dismissed without prejudice. Given the substance of the motion and the alternative relief requested, I find that it is more properly styled as a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) or for failure to state a claim under Rule 12(b)(6) than a "motion to stay." So construed, no additional responsive pleading was necessary.

The next question is whether to permit the motion's late filing. This inquiry is guided by Fed. R. Civ. P. 6(b)(1)(B), which permits a court to extend the time for the doing of an act "if the party failed to act because of excusable neglect." The term "excusable neglect" as used in Rule 6(b) is a flexible concept that encompasses late filings caused by inadvertence, mistake or carelessness. *Pioneer Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 389 (1993). In deciding whether a particular neglect is "excusable," the court must consider all the relevant circumstances surrounding the omission, including the length and reason for the delay, its potential impact on judicial proceedings, whether the movant acted in good faith and the danger of prejudice to other parties. *Id*. at 395.

I am satisfied that excusable neglect has been shown here. The delay was only 10 days, it had no impact on the judicial proceedings and it did not prejudice any other parties. Although defendant's excuse—that its lawyers were busy with other cases—is a virtual admission of attorney

negligence, there is no hard and fast rule in the Seventh Circuit that such lapses can never be deemed excusable neglect. *Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354, 361 (7th Cir. 1997); *see also Mommaerts v. Hartford Life and Accident Ins. Co.*, 472 F.3d 967, 968 (7th Cir. 2007). Taking all the relevant circumstances into account, including defendant's commitment to defending this case as demonstrated by its subsequent timely filings, I find excusable neglect exists to permit the filing of the late motion. It follows that plaintiffs' motion for entry of default will be denied.

II. Ripeness/Request for Stay

Plaintiffs assert two claims against defendant: 1) breach of contract; and 2) bad faith. Defendant argues that plaintiffs' suit should be dismissed or stayed because it is not ripe. Specifically, defendant asserts that it still needs to inspect plaintiffs' home and investigate their claim for additional living expenses to determine whether or how much to pay out under the policy. Until it makes a final determination on plaintiffs' claim, contends defendant, there has been no breach of contract nor bad faith.

Ripeness doctrine is based on the Constitution's case-or-controversy requirements as well as discretionary prudential considerations. 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532, at 365 (3d ed. 2008). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–81 (1985)). Whether a claim is ripe for adjudication depends on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

I agree with defendant that plaintiffs jumped the gun. Plaintiffs do not deny that defendant has not yet denied their claim for payment of the policy benefit. The thrust of their complaint is that defendant is breaching its duty of good faith and fair dealing by insisting that the home be inspected, which plaintiffs contend is patently unreasonable in light of the raze order. As a matter of common sense, plaintiffs have a point: why does defendant need to inspect the home further in light of the raze order?[2] *See Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co. of Milwaukee*, 72 Wis. 2d 84, 91, 240 N.W. 2d 140, 145 (1976) (recognizing that when an owner who is precluded from rebuilding and is required by a municipality to destroy the building, a constructive total loss results and the valued policy law applies to require the insurer to pay the full face value of the policy); Wis. Admin. Code § INS 4.01(2)(h) ("Operation of building laws. Real property owned and occupied by the insured which is partially destroyed but ordered destroyed under a fire ordinance or similar law shall be considered wholly destroyed for purposes of s. 632.05(2), Stats."). Nonetheless, a claim that an insurer is violating its duty to its insured by failing reasonably to investigate a claim is a claim of bad faith, not breach of the insurance contract. *See Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 686-87, 271 N.W. 2d 368 (1978) ("bad faith conduct by one party to a contract toward another is a tort separate and apart from a breach of contract Per se").

But here's the kicker: in Wisconsin, an insurer's bad behavior does not ripen into a bad faith claim unless and until there has been a breach of the insurance contract. This was made clear by the Wisconsin Supreme Court in *Brethorst v. Allstate Property and Cas. Ins. Co.*, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467 (2011), which involved a first-party claim of bad faith like plaintiffs assert here. In *Brethorst*, the issue was whether a plaintiff who sued her insurer only for bad faith could take discovery on that claim without first establishing some breach of contract by the

[2] Defendant recently submitted a supplemental brief and affidavit indicating that the raze order has not been properly served. Dkts. 27 and 28. I have disregarded those documents because the dispute about service is irrelevant to the stay analysis.

insurer. The Court answered the question in the negative, finding that "first-party bad faith cannot exist without some wrongful denial of benefit under the insurance contract." *Id*. at ¶56, 334 Wis. 2d at 48, 798 N.W. 2d at 480. Although the pattern jury instructions for a bad faith claim, quoted by the Court, indicate that "bad faith . . .is the absence of honest, intelligent action or consideration of its insured's claim,"and that a factfinder could consider whether the insurer "properly investigated" the claim, these instructions are in the context of the insurer actually having denied the claim. *Id.* at ¶ 36, 334 Wis. 2d at 41,798 N.W.2d at 476-77. The Court then indicated that although it had "some misgivings" about its conclusion because it did not want to encourage bad behavior by insurers against their insureds, the proper sanction for such behavior did not lie in a bad faith claim unless the bad behavior was related to a breach of the insurance contract. *Id*. at ¶¶ 66-70, 334 Wis. 2d at 52-53, 798 N.W. 2d at 482.

In her concurrence, Justice Bradley (joined by Chief Justice Abrahamson) takes exception to this holding, providing a treatise's example of bad faith eerily similar to the circumstances alleged in the instant case to support her contention that sometimes the manner in which the insurer conducts its investigation can show bad faith. *Id.* at ¶¶ 99-100; 334 Wis. 2d 62-63; 798 N.W.2d at 477-78. But this position was rejected by the majority and therefore does not govern the instant lawsuit.

Accordingly, unless and until defendant denies plaintiffs the relief to which they claim to be entitled under the insurance policy, neither their breach of contract nor bad faith claim is ripe. Under these circumstances, it appears that dismissal without prejudice would be appropriate. Nonetheless, given that defendant appears to prefer a stay over dismissal, combined with the fact that plaintiffs' deadline for filing suit under the policy may expire on April 10, 2012, I will instead issue an order staying this case. *See South Austin Coalition Community Council v. SBC Communications Inc.*, 191 F.3d 842, 844 (7th Cir. 1999) ("sometimes prematurely filed suits are

retained on the docket until it is time to proceed"), citing *United States v. Michigan National Corp.*, 419 U.S. 1 (1974).

That said, defendant had better complete its investigation of plaintiffs' claim forthwith –with full cooperation from plaintiffs, of course–or else the court will have to answer the question whether defendant's failure timely to make a final decision on this claim constitutes a constructive denial and whether this constructive denial demonstrates bad faith.

ORDER

IT IS ORDERED THAT:

(1) Defendant Country Mutual Insurance Company's motion for a retroactive extension of its deadline for answering or otherwise defending against the complaint, dkt. 15, is GRANTED;

(2) Plaintiffs Joseph and Tammy Burnetts's motion for default judgment, dkt. 10, is DENIED;

(3) Defendant's motion to stay, dkt. 9, is GRANTED;

(4) The parties are to notify the court forthwith when defendant reaches a final decision on plaintiffs' claim for benefits under the policy, at which time the court will set a prompt preliminary pretrial conference; and

(5) If the court has not received by May 15, 2012 the notification required by paragraph (4) of this order, then the court shall hold a telephonic preliminary pretrial conference on May 31, 2012 at 9:00 a.m.

Entered this 3rd day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge