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

JOSEPH BURNETT and TAMMY BURNETT,

Plaintiffs,

v.

COUNTRY MUTUAL INSURANCE COMPANY,

Defendant/Third-Party Plaintiff,

v.

TOWN OF MERRILL, WISCONSIN,

Third-Party Defendant.

OPINION AND ORDER

12-cv-0019-slc

In this civil lawsuit removed from state court, plaintiffs Joseph and Tammy Burnett are suing their homeowner's insurance company, defendant Country Mutual Insurance Company, for breach of contract and bad faith in connection with the company's handling of their claim for losses incurred when their home was struck by a tornado. The Burnetts' primary complaint is that Country Mutual failed to pay the dwelling coverage limits even after the home was ordered razed by the Town of Merrill. Country Mutual has filed a counterclaim for declaratory judgment against the Burnetts and the Town of Merrill, asking for an order declaring the raze order void *ab initio* because it was not properly served on the Burnetts. Jurisdiction is present in this court pursuant to 28 U.S.C. § 1332, at least for the dispute between the Burnetts and Country Mutual. More on this below.

The Burnetts have moved for summary judgment on their breach of contract claim, contending that Country Mutual breached the insurance policy by: 1) failing to pay the dwelling coverage limits; 2) first denying then later agreeing to pay additional living expense coverage; and 3) failing to conduct a timely investigation and make timely payment of the dwelling coverage

limits under the policy. Dkt. 50. Country Mutual and the Town of Merrill each has moved for summary judgment on the counterclaim regarding service of the raze order. Dkts. 48, 53.

The Burnetts' claim with respect to the dwelling coverage limits is based on Wisconsin's Valued Policy Law, Wis. Stat. § 632.05. This law declares that when, as a result of an insured loss, a property owner is ordered by a municipality to destroy the insured building, a constructive total loss results and the insurer must pay the full face value of the policy. Because the Town of Merrill issued a raze order for their home, say the Burnetts, Country Mutual became obliged under the Valued Policy Law to pay the dwelling coverage limits and its failure to do so is a breach of the insurance contract. The Burnetts points out that although Country Mutual had an opportunity to challenge the raze order in state circuit court, it failed to do so.

Country Mutual does not dispute that a raze order was issued for the Burnetts' home, it does not dispute that a raze order triggers payment of the policy limits under the Valued Policy Law, and it does not dispute that it received notice of the raze order within the statutory time period for contesting the order in state court. Instead, Country Mutual wages a collateral attack on the order, contending that it was void *ab initio* because it was not properly served on the Burnetts. As discussed below, this theory has no merit. Country Mutual does not have standing to object to alleged defects in the manner in which service was accomplished on the Burnetts and in any case, that service was proper. Consequently, by going all in on a flawed legal theory rather than contesting the raze order in state court, Country Mutual now is barred from challenging the raze order and has breached its contract with the Burnetts.

Summary judgment is not appropriate on the Burnetts' claim that Country Mutual breached the insurance contract by initially denying Additional Living Expense coverage and failing to make timely payment of the dwelling coverage limits under the policy. Although the

Burnetts may seek to recover interest on these claims under Wis. Stat. § 628.46 and may pursue their claim of bad faith based on the denial of the dwelling coverage limits, neither of these claims is tied to any particular provision of the policy, which means that the Burnetts' breach of contract theory is not viable.

Finally, even though Country Mutual's counterclaim against the Town of Merrill would fail for precisely the same reasons it fails as a defense to the Burnetts' claim of breach related to the failure to pay the dwelling coverage limits, it must be dismissed without prejudice for lack of jurisdiction.

I find the following facts to be undisputed and material solely for the purpose of deciding the summary judgment motions:

FACTS

Plaintiffs Joseph and Tammy Burnett are residents of the State of Wisconsin. Defendant/Counterclaimant Country Mutual Insurance Company is an insurance company organized under the laws of Illinois. Counterdefendant Town of Merrill, Wisconsin is a municipality located in Lincoln County, Wisconsin.

Country Mutual issued a policy of homeowners insurance to the Burnetts for their primary home and outbuildings located at N3003 Maplewood Road, in Merrill, Wisconsin. On April 10, 2011, the Burnetts' residence was damaged by a tornado, rendering it uninhabitable. The Burnetts promptly notified Country Mutual of the loss. At that time, the policy was in full force and effect and contained a dwelling coverage limit of $173,200.

By letter dated June 20, 2011, Country Mutual informed the Burnetts that it had issued a check for actual cash value ("ACV") in the amount of $38,282.94. Of that amount, $17,230.00 was for damage to an auxiliary outbuilding. Thus, $21,052.94 was tendered for an estimate for visible damage to the primary residence. Country Mutual informed the Burnetts that the claim file still was open, but that Country Mutual needed to re-inspect the primary residence to determine if there was damage to the foundation. Country Mutual advised that this inspection would require the drywall to be removed from the walls. It directed the Burnetts to obtain two competitive local bids for the stripping of the drywall, stating that once those bids had been obtained, the company would "approve then include the cost to remove and replace the drywall, less any applicable depreciation, as part of the claim."

In a letter dated October 20, 2011, Country Mutual informed the Burnetts that it was denying their claim for Additional Living Expense Coverage.

Sometime thereafter, the Burnetts retained a public adjuster, who provided an interior tear-out estimate of $52,654.85. The Burnetts provided this estimate to Dave Hilgendorf, a building inspector for the Town of Merrill.

On October 24, 2011, Michael Konz, counsel for the Burnetts, wrote to Hilgendorf. In the letter, Konz stated that he understood that Hilgendorf had inspected the property and was willing to issue a raze order. Konz enclosed a proposed raze order for Hilgendorf's review and approval. In addition, he informed Hilgendorf that, "[w]ith respect to serving the Order, please be advised that I will accept service on behalf of the Burnetts by an Admission of Service, once the Order has been signed." Konz directed Hilgendorf to serve the raze order upon him by U.S.

Mail, and included a stamped envelope for that purpose. Konz did not have responsibility for physically maintaining the Burnett's home.

On October 28, 2011, Hilgendorf issued the raze order for the property. The raze order stated that the Burnetts' house was unreasonable to repair, pursuant to Wis. Stat. § 66.0413. The raze order was not personally served upon the Burnetts, but was sent to Konz, as he had instructed. Konz accepted service on behalf of the Burnetts, indicating that he had been authorized to do so.

On November 9, 2011, the Burnetts forwarded a copy of the raze order to Country Mutual. They informed the company that in their view, the raze order was presumptive proof that repairs to the dwelling were unreasonable and that it should be deemed a constructive total loss under Wisconsin's "valued policy law", Wis. Stat. § 632.05.[1] The Burnetts again demanded that Country Mutual pay the policy limits. The company maintained its position that further inspection was necessary.

Country Mutual subsequently obtained legal counsel. On November 30, 2011, counsel for Country Mutual sent a letter stating that his client would reconsider the Burnetts' Additional Living Expense claim if they submitted evidence. Counsel also stated that Country Mutual was continuing to investigate the loss and whether the damages to the dwelling were extensive enough to invoke Wisconsin's valued policy law.

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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.

On December 21, 2011, the Burnetts served Country Mutual with a complaint that they had filed in the Circuit Court for Lincoln County on October 7, 2011. In the complaint, they alleged that Country Mutual had breached the terms of the insurance policy by failing, refusing or delaying payment for damages claimed and that its actions constituted bad faith. Complaint, dkt. 3, exh. A. On January 6, 2012, Country Mutual removed the case to this court. On April 3, 2012, this court issued an order staying the case until Country Mutual completed its investigation.

By letter dated May 15, 2012, Country Mutual advised the court and the Burnetts that it had made a coverage determination: it would not be paying any additional sums for repair of the damage to the Burnett home beyond the $21,052.94 actual cost value amount previously issued on April 18, 2011. Country Mutual also indicated that it would cover the Burnetts' rent expenses from the date of loss to the then-present date. On May 30, 2012, it issued a check to the Burnetts for $5,200.

On June 4, 2012, Country Mutual filed its answer and affirmative defenses to the complaint. It also filed a counterclaim for declaratory judgment against the Burnetts and the Town of Merrill, seeking a declaration that

> a Raze Order issued by the Town of Merrill, Wisconsin with regard to the dwelling owned by Joseph and Tammy Burnett is void *ab initio* due to improper service.

Dkt. 36, Counterclaim, ¶1. Country Mutual is not seeking damages from the Town. Country Mutual served the Answer and Counterclaim, along with a summons, on the Town Chairman on September 15, 2012.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56[c). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Plaintiffs' Breach of Contract Claim for Failure to Pay Dwelling Coverage Limits and Cross-Motions on Country Mutual's Counterclaim

The Burnetts contend that Country Mutual breached the insurance policy by failing to pay them the dwelling coverage limit after the raze order was issued for their home. They rely on Wisconsin's Valued Policy law, which is set forth above at 5, n. 1. Interpreting this statute, the Wisconsin Supreme Court has held that "when, as a result of an insured loss, the owner is

precluded from rebuilding and is required by the municipality to destroy the insured 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." *Gimbels Midwest, Inc. v. Northwestern Nat. Ins. Co. of Milwaukee*, 72 Wis.2d 84, 91, 240 N.W.2d 140, 145 (1976) (citing *Gambrell v. Campbellsport Mut. Ins. Co.*, 47 Wis.2d 483, 177 N.W.2d 313 (1970)). *See also* 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."). As the court explained in *Gimbels*,:

> [T]he provisions of the valued policy law are as much a part of the insurance contract as if they were actually written into the policy. The effect of that law, when a total loss occurs, is the same as a contract for liquidated damages. As such, where a total loss occurs, settlements for less than the face value of the policy are invalid as unsupported by adequate consideration. More importantly, because the valued policy law is based upon public policy, the parties cannot waive its provisions even by express contract. An attempted settlement for less than the face value where there has been a total loss, constructive or otherwise, is void ab initio as contrary to public policy.

72 Wis. 2d at 92, 240 N.W. 2d at 145(internal citations and footnotes omitted).

Country Mutual does not take issue with these legal principles or deny that a valid raze order triggers an insurer's obligation to pay the full face value of the insurance policy. Instead, it argues that the raze order in this case has no such effect because it was not served in accordance with the terms of the statute, making it void *ab initio*. Country Mutual has filed its own motion for summary judgment on its counterclaim, asking this court to issue an order declaring that the raze order issued by the Town of Merrill's building inspector is void. As discussed below, County Mutual's position is meritless.

A. Wisconsin's Raze Statute

Pursuant to Wis. Stat. § 66.0413(1)(b), the governing body, building inspector or other designated officer of a municipality may

> [i]f a building is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and unreasonable to repair, order the owner of the building to raze the building or, if the building can be made safe by reasonable repairs, order the owner to either make the building safe and sanitary or to raze the building, at the owner's option.

The costs of repairing such a building are presumed to be unreasonable if the costs of repairs would exceed 50% of the assessed value of the building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue. Wis. Stat. § 66.0413(1)[c).

Under Wis. Stat. § 66.0413(1)(d), a raze order "shall be served on the owner of record of the building that is subject to the order or on the owner's agent if the agent is in charge of the building in the same manner as a summons is served in circuit court." Wis. Stat. § 66.0413(h) provides that a person "affected by" a raze order may apply to the circuit court for a restraining order within the time provided by Wis. Stat. § 893.76 "or forever be barred." Wis. Stat. § 893.76, in turn, provides:

> An application under s. 66.0413(1)(h) to a circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing a building or part of a building and restoring a site to a dust-free and erosion-free condition shall be made within 30 days after service of the order issued under s. 66.0413(1)(b) or be barred.

The Wisconsin Supreme Court has found that an insurer is "affected" by a raze order within the meaning of this section and therefore may challenge its validity. *Gimbels*, 72 Wis. 2d

at 97, 240 N.W. 2d at 147-48. However, the exclusive remedy for waging such a challenge is that set forth in § 66.0413(h). *Id*. Thus, an insurer who is notified of the raze order within a time frame sufficient to permit a challenge under the statutory procedure but who fails to exercise that procedure is forever barred from challenging the reasonableness of the raze order. *Id*.

B. The Raze Order for the Burnetts' Home Is Not Void *Ab Initio*

Here, it is undisputed that Country Mutual received notice of the raze order within 30 days of its issuance and there is no evidence to suggest that Country Mutual was deprived of an opportunity to challenge it under the exclusive statutory procedure. Under the plain terms of Wis. Stat. § 66.0413(h), it is now "forever barred" from doing so.

Not so fast, says Country Mutual: it claims that the 30-day time period in which to seek a restraining order never started running because the raze order was "void *ab initio*." The order was void, Country Mutual says, because it was not properly served on the Burnetts in the manner described in Wis. Stat. § 66.0413(1)(d). Country Mutual points out that it is undisputed that the Burnetts were not personally served with the order, and, although acknowledging that they authorized service on their lawyer, Country Mutual argues that such authorization was ineffective under the statute because the lawyer was not "in charge of" the dwelling.

This argument is frivolous. Wis. Stat. § 66.0413(1)(d) provides that a raze order must be served on the building owner or his agent in charge of the building "in the same manner as

a summons is served in circuit court." Wis. Stat. § 801.11 specifies the different ways in which a summons can be served. Germane to this case is § 801.11(1)(d), which provides:

> A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> * * *
>
> (d) In any case, by serving the summons in a manner specified by any other statute upon the defendant *or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.*

(emphasis added). Here, Attorney Konz was appointed to act as the Burnetts' agent for purposes of accepting service of the raze order.

As just noted, Country Mutual does not dispute this fact. Instead, it puts its own gloss on the statutory language to argue that § 801.11(1)(d) applies only in cases where some other statute specifies the means of service. The Wisconsin Supreme Court disagrees:

> [W]e read [§ 801.11(1)(d)] as clearly providing a distinct ground for effectuating service upon "an agent authorized by appointment or by law to accept service of the summons for the defendant." From the statute's face, we do not interpret Wis. Stat. § 801.11(1)(d) as requiring service on an agent to be linked to "any other statute." Thus, we read the statute as providing the following two grounds for carrying out service: (1) by serving the summons in a manner specified by any other statute upon the defendant; or (2) by serving the summons upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

Mared Industries, Inc. v. Mansfield, 2005 WI 5, ¶ 12, 277 Wis. 2d 350, 360, 690 N.W. 2d 835, 840. Country Mutual's contention that the raze order was not properly served is D.O.A.

In any case, even if this claim of improper service were to have had a pulse, Country Mutual has no standing to raise it. Notably, Country Mutual does not contend that ***it*** was entitled to service under the statute. Its objection to service is based on how service was

accomplished on the Burnetts. However, "[a] party may 'object to personal jurisdiction or improper service of process only on behalf of himself or herself, since the objection may be waived.'" *In re M .W.*, 232 Ill.2d 408, 427 (2009), quoting *Fanslow v. Northern Trust Co.*, 299 Ill. App.3d 21, 29 (1998)). *See also United States v. Tomison*, 969 F. Supp. 587, 596 (E.D. Cal. 1997) (Government lacks standing to move to quash subpoena served on third party as "unreasonable or oppressive" because "the government lacks the sine qua non of standing, an injury in fact relative to th[e] grounds [for the proposed challenge]"); *United States v. Evans*, 574 F.2d 1287, 1288 (5th Cir. 1978) ("Evans lacks standing to object that records admitted at his trial were obtained from his employer through an administrative summons rather than by subpoena or search warrant"); *United States v. Viltrakis*, 108 F.3d 1159, 1160–61 (9th Cir. 1997) (collecting decisions that "turn on the principle that the person served with process is the proper party to allege error"); *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Col.1997) (defendant lacks standing to move to quash third-party subpoena on grounds of defective service).

Although I have not found a Wisconsin case expressly stating this principle, Wisconsin follows the general rule that a party must assert its own rights and interests and not those of third parties. *All Star Rent A Car, Inc. v. Wisconsin Dept. of Transp.*, 2006 WI 85, ¶58, 292 Wis. 2d 615, 641, 716 N.W.2d 506, 519 (2006) ("[B]ecause personal jurisdiction is a personal defense, DOT could not have waived DHA's objection to the circuit court's lack of personal jurisdiction over DHA."); *State v. Horn*, 126 Wis.2d 447, 453, 377 N.W.2d 176, 179 (Ct. App. 1985) ("A party may not rest his legal claims or defenses upon the rights of third parties"), *aff'd*, 139 Wis.2d 473, 407 N.W.2d 854 (1987).

Consistent with this principle, none of the cases cited by Country Mutual in which an order was found void for defective service involved an objection to service by a third party. In *State ex rel. Borst v. City of New Richmond Bd. of Appeals*, 2010 WI App 1, 2009 WL 3818512 (Ct. App. 2009) (unpublished disposition), the party who brought the suit was an *owner* of the property, who indisputably was entitled to personal service under the raze statute. *Id*. at ¶¶7-8. Similarly, in *Bergstrom v. Polk County*, 2011 WI App 20, 331 Wis. 2d 678, 795 N.W. 2d 482, the parties who objected to improper service were *defendants* in the plaintiff's certiorari action. Unlike Country Mutual in the instant case, the parties in those cases were asserting their own rights to proper service, not those of a third party.

Taking a different tack, Country Mutual attempts to manufacture standing by recharacterizing its argument as an attack on the Town's authority. According to Country Mutual, the Town exceeded the authority granted by statute by "ordering that the raze order would take effect at a time that is different than that specified in the statute." Br. in Opp., dkt. 70, at 2-4. Though framed separately from its improper service argument, it is based on the same alleged error. Specifically, Country Mutual argues that "the Raze Order changes the commencement of the statutory limitation period [for challenging the raze order], by allowing the time to run when service is made on a person who is *NOT* 'the owner of record of the building that is subject to the order or on the owner's agent if the agent is in charge of the building.'" *Id*. Country Mutual says it has standing to object to the commencement of the limitations period because, as a party "affected by" the raze order, the date on which the limitations period commenced substantially affects its rights.

This argument does not advance Country Mutual's position. First, Wis. Stat. § 893.76 provides that an application to restrain enforcement of a raze order "shall be made within 30 days after service of the order." It does not say that the 30-day period starts running only when all affected parties are satisfied that the order has been properly served. Second, there is no dispute in this case that Country Mutual was made aware both of the raze order *and* the fact that the Burnetts were expressly admitting service of the order by November 9, 2011, which was well within 30 days of the date the order was served on the Burnetts' counsel. Thus, Country Mutual has no basis to assert that it was aggrieved by the allegedly improper service. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (to have standing, plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). To the extent that Country Mutual portrays itself as the aggrieved party here, any purported injury is completely self-inflicted, the result of the company's deliberately chosen but puzzlingly misguided legal strategy, not because of any unlawful conduct by the Town.

In light of these conclusions–that Country Mutual lacks standing to raise a defense based on a right personal to the Burnetts, and that in any case, service was proper–there is no ground on which to invalidate the raze order. Country Mutual waived its opportunity to challenge the order by failing to avail itself of the statutorily-mandated procedure set out in Wis. Stat. § 66.0413(h). It follows that by failing to do so *and* by failing to pay the policy limits, Country Mutual has breached its contract with the Burnetts. Therefore, the court is granting summary judgment to the Burnetts on this aspect of their claim.

II. Breach of Contract Based on Late Payment of Additional Living Expenses

The Burnetts contend that County Mutual breached the insurance contract by denying their claim for Additional Living Expense (ALE) coverage on October 20, 2011. But as Country Mutual points out, about a month later, on November 30, 2011, it informed the Burnetts that it had reconsidered its decision on ALE coverage and that they were to submit evidence in support of their claim. Apparently, the Burnetts did so; on or about May 15, 2012, Country Mutual sent a check to the Burnetts for $5,200 for their ALE claim.

I agree with Country Mutual that on these facts, the Burnetts have not established that they are entitled to judgment as a matter of law for breach of contract for the initial denial of ALE coverage. Their claim is not that they were not paid, but rather that they were not paid promptly. Although the Burnetts point out that Wisconsin has recognized that insurers have an implicit duty to investigate claims promptly and to act in good faith towards their insureds, violation of that duty, though arising from the contractual relationship, sounds in tort, not contract. *Roehl Transport, Inc. v. Liberty Mutual Ins. Co.*, 2010 WI 49, ¶43, 325 Wis. 2d 56, 784 N.W. 2d 542 ("[T]he tort of bad faith is derived from the implied covenant of good faith and fair dealing found in every contract. Thus the breach of duty from which the tort claim follows is not of any explicit term of the contractual obligations but of the implicit duty to act in good faith in carrying out the insurance contract.").

But these principles don't help the Burnetts because of *Brethorst v. Allstate Property and Cas. Ins. Co.*, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467 (2011), which holds that 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. *See* Ord. on Mot. to Stay, April 3, 2012, dkt. 31, at 6-7

(discussing *Brethorst*). Indeed, I presume that the Burnetts seek to shoehorn their complaint about the delay in payment of the ALE claim into a breach of contract claim precisely to avoid the "no breach = no bad faith" principle. This isn't going to work for them.

But the Burnetts are not entirely without remedy: under Wis. Stat. § 628.46, insurance claims shall bear interest at the rate of 12% per annum if not paid within 30 days after the insurer is furnished written notice of the fact and amount of the covered loss.[2] *See Kontowicz v. Am. Standard Ins. Co.*, 2006 WI 48, ¶ 27, 290 Wis.2d 302, 714 N.W.2d 105. The Burnetts' complaint includes a claim for interest under § 628.46. This statute "is unrelated to the tort of bad faith and permits the imposition of interest even where bad faith is not present." *Poling v. Wisconsin Physicians Serv.*, 120 Wis. 2d 603, 613, 357 N.W. 2d 293 (Ct. App. 1984).

Country Mutual can avoid liability for interest if it has "reasonable proof" to establish that it was not responsible for the payment of Additional Living Expenses. *Kontowicz*, 2006 WI at ¶48. "Reasonable proof" is defined as the amount of information that is sufficient to allow a reasonable insurer to conclude that it may not be responsible for payment of a claim. *Id*. In general, an insurer can prove non-responsibility under § 628.46 if it can show that the "coverage

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[2]Section 628.46 states:

> Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and the amount of the loss.... Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer.... All overdue payments shall bear simple interest at the rate of 12% per year.

issue was fairly debatable." *Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 160, 519 N.W.2d 723 (Ct. App. 1994) (citation omitted).

The record has not been developed sufficiently to permit a finding whether Country Mutual had a reasonable basis for initially denying ALE coverage and in any event, neither party has moved for summary judgment on the Burnetts' statutory interest claim. Accordingly, this remains an issue for trial.

IV. Breach of Contract for Untimely Payment

Finally, the Burnetts contend that Country Mutual breached the insurance policy by improperly delaying payment of the dwelling coverage limits. The Burnetts already have prevailed on their claim that Country Mutual breached the contract by refusing to pay the dwelling coverage limits. As should be clear from Section III of this order, this claim arising out of Country Mutual's *delay* in paying on its policy sounds in the tort of bad faith, not contract.

Unlike Country Mutual's actions with respect to the ALE claim, which it ultimately paid, Country Mutual has refused to pay the dwelling coverage limits even after the raze order was issued and the time for challenging that order had passed. In this instance, the Burnetts' claim for bad faith is unquestionably ripe. They may pursue their bad faith claim, as well as their claim for interest under Wis. Stat. § 628.46, at trial.

IV. Country Mutual's Counterclaim Against the Town Must be Dismissed for Lack of Jurisdiction

Although devoid of substantive merit, Country Mutual's counterclaim against the Town of Merrill for a declaration that the raze order is void must be dismissed without prejudice because this court lacks subject matter jurisdiction over the claim. *Murray v. Conseco, Inc.*, 467 F.3d 602, 605 (7th Cir. 2006) ("A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice.") *Id*.

As the Town points out, Country Mutual does not seek any damages or indemnity from the Town, nor does it claim that the Town is liable for any amounts that the Burnetts may recover from Country Mutual. It has impleaded the Town simply to wage a state law collateral attack on the raze order, in order to eliminate the raze order as a factual basis for the Burnetts' claim against Country Mutual relating to the terms of the insurance policy. This is not a proper third-party claim under Fed. R. Civ. P 14. 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1446, at 415–21 (3d ed. 2010) (crucial characteristic of Rule 14 claim is that defendant is attempting to transfer to third-party defendant the liability asserted against defendant by the original plaintiff; mere fact that alleged third-party claim arises from same transaction or set of facts as original claim is not enough.); *see also Parr v. Great Lakes Exp. Co.*, 484 F.2d 767, 769 (7th Cir. 1973) (third party action "presupposes liability on the part of the original defendant which he is attempting to pass on to the third-party defendant").

But wait, says Country Mutual: Rule 14 is not the proper rule. According to Country Mutual, the Town is not really a third-party defendant under Rule 14, but a co-defendant properly joined under Rule 20(a)(2) to Country Mutual's Rule 13 counterclaim against plaintiffs. This approach doesn't help Country Mutual, either, because the "counterclaim" fails

to state a claim against the Burnetts. In the counterclaim, Country Mutual seeks a declaratory judgment that the raze order is invalid because it was improperly served. It does not seek any relief from the Burnetts or allege any wrongdoing on their part. Having asserted no right to relief from the Burnetts, there is no "claim" to which Country Mutual can join the Town under Rule 20. *See* Fed. R. Civ. P. 20(a)(2) (persons may be joined in one action as defendants if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"). The only proper rule that could apply is Rule 14, but as discussed above, the Town is not a proper party under that rule.

The upshot is that Country Mutual's action for declaratory judgment against the Town is a wholly independent action that does not belong in this lawsuit and for which jurisdiction is lacking. There is no amount in controversy between the Town and Country Mutual and it raises no federal question. Accordingly, Country Mutual's counterclaim against the Town must be dismissed for lack of jurisdiction. Although such a dismissal must be without rather than with prejudice, in this case that distinction is academic: as should be pellucid from this court's discussion of the raze order in the context of the Burnetts' claim for breach of contract, it would be futile for Country Mutual to attempt to resurrect this matter in state court.

ORDER

IT IS ORDERED THAT:

1) Plaintiffs Joseph and Tammy Burnetts' motion for summary judgment, dkt. 50, is GRANTED with respect to plaintiffs' claim that Country Mutual breached the insurance contract by failing to pay the dwelling coverage limits and is DENIED in all other respects; and

2) Defendant Country Mutual's motion for summary judgment, dkt. 48, is DENIED;

3) Third-Party Defendant Town of Merrill's motion for summary judgment, dkt. 53, is GRANTED in part and DENIED in part. It is GRANTED insofar as it requests dismissal of the counterclaim for lack of jurisdiction, but DENIED insofar as it seeks dismissal with prejudice; and

4) Country Mutual's counterclaim against the Town of Merrill is DISMISSED without prejudice.

Entered this 2nd day of May, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge