DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO Adams County Justice Center 1100 Judicial Center Dr. Brighton, CO 80601	DATE FILED: April 3, 2017 9:39 AM CASE NUMBER: 2016CV31957
STATE FARM MUTUAL AUTOMOBILE INS. CO. Plaintiff, v. **RAFAEL A. HINOJOSA et al.** Defendants.	**COURT USE ONLY** Case No. 16-CV-31957 Division: C Courtroom: 506
ORDER	

Defendant Claudio E. De La Cruz-Arellano ("De La Cruz-Arellano") filed a Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) on February 23, 2017. Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") filed a Response on March 16, 2017. De La Cruz-Arellano filed a Reply on March 20, 2017.

The court takes judicial notice of the court file and findings therein under CRE 201(c) and being fully informed, finds and orders as follows:

Background

This case arises out of State Farm's claim for Declaratory Relief for Breach of Contract. State Farm alleges that De La Cruz-Arellano was involved in a motor vehicle accident and claimed to be injured due to the negligence of Defendants Rafael A. Hinojosa ("Hinojosa") and Tomasa Gracia-Guerrero ("Gracia-Guerrero"), as well as other parties. Hinojosa and Gracia-Guerrero were insureds under an automobile liability policy through State Farm, which included liability limits of $25,000/person and $50,000/accident. De La Cruz-Arellano filed suit

against Hinojosa and Gracia-Guerrero (15CV31724), in which State Farm provided a defense to Hinojosa and Gracia-Guerrero. Before the case proceeded to jury trial, Hinojosa and Gracia-Guerrero entered into a "Nunn Agreement" with De La-Cruz Arellano, without permission from State Farm. State Farm claims that Hinojosa and Gracia-Guerrero breached their duties under their contract and violated State Farm's rights under the contract. State Farm now seeks a determination that Hinojosa and Gracia-Guerrero breached their obligations under the insurance contract and thus that State Farm owes no liability coverage to Hinojosa, Gracia-Guerrero, or Cruz-Arellano. Gracia-Guerrero and Hinojosa both filed disclaimers of interest in the outcome of this action.

Nature of Relief Sought

De La Cruz-Arellano seeks an order dismissing State Farm's Complaint with prejudice. State Farm opposes.

Brief Summary of the Parties' Arguments

Motion

State Farm must plead facts sufficient to demonstrate that (1) Hinojosa and Gracia-Guerrero entered into a contract with State Farm, (2) Hinojosa and Gracia-Guerrero failed to fulfill their contractual obligations, and (3) State Farm substantially performed and complied with its duties under the contract. First, State Farm fails on the second and third element. State Farm fails to allege whether Hinojosa and Gracia-Guerrero were informed they needed State Farm's permission to enter into the Nunn agreement and why permission was required; how there is a breach in the absence of a provision of the insurance policy prohibiting entering into a Nunn agreement; how a Nunn agreement can be considered a breach of contract; the timing of the Nunn agreement *vis-à-vis* State Farm's failure to resolve De La Cruz-Arellano's claims within the policy limits; and whether State Farm met all of its obligations under the policy. Second, the complaint does not address

how the Nunn agreement interferes with State Farm's right to defend. State Farm defended the lawsuit against their insured and has the opportunity to defend in any litigation in the future. Third, State Farm fails to allege any facts showing that the signing of the Nunn Agreement was a breach or what obligations Hinojosa and Gracia-Guerrero assumed. It is unclear from the Complaint how Hinojosa and Gracia-Guerrero failed to cooperate. Fourth, State Farm pled no facts to support a conclusion that signing a Nunn Agreement is a breach of contract. They indicate no prohibition in the policy against signing a Nunn Agreement. Moreover, a Nunn agreement is permitted under Colorado case law. State Farm failed to protect its insured and Hinojosa and Gracia-Guerrero, aware of this fact, signed the Nunn Agreement with the advice of counsel.

Response

De La Cruz-Arellano appears to suggest that State Farm must meet a heightened pleading standard by essentially proving its case in the Complaint. State Farm need only give a short plain statement of the claim showing that the pleader is entitled to relief. The standard is *plausibility*, not ultimate proof. Accordingly, the Complaint does contain sufficient facts to state a plausible claim for relief. Defendants entered into a Nunn agreement that contains various provisions that conflict with the terms of the policy contract. De La Cruz-Arellano also suggests that State Farm must disprove potential affirmative defenses in the Complaint. State Farm need not prove it substantially performed in the Complaint. State Farm adequately provides facts to show that Defendants entered into a contract with State Farm and that Defendants thus failed to fulfill their obligations under the contract. The third element that State Farm substantially performed its obligations is only relevant when plaintiff's performance is a condition precedent to plaintiff's right to recover under the contract. State Farm does not seek a right to recover under the contract and thus, it need not establish its substantial

performance. Regardless, the Complaint alleges facts that State Farm was performing under the contract by providing a defense to Hinojosa and Gracia-Guerrero and retained counsel at its expense. Furthermore, State Farm has alleged a justiciable controversy. While Nunn Agreements are permitted under Colorado law, this specific agreement caused a breach in Hinojosa and Gracia-Guerrero's obligations under the State Farm policy contract. State Farm also sufficiently alleges damages. In the Nunn Agreement, Hinojosa admits to allegations that are contrary to statements he made to State Farm and retained counsel, which were the basis of State Farm's decision making. Now, Hinojosa and Gracia-Guerrero are demanding State Farm pay on the verdict which will be entered and State Farm was not able to control, as was their right under the policy.

Reply

State Farm's Complaint lacks facts sufficient to establish a cause of action. The fact that Defendants simply entered into a Nunn agreement is not sufficient to state a plausible claim for relief. State Farm must allege facts to articulate how entering into the Nunn Agreement breached the insurance contract and damaged State Farm. The Complaint fails to allege any support for State Farm's contention that signing a Nunn agreement is a basis for contract rescission. Nunn agreements are lawful and simply stating that the insured entered into an agreement and thus breached a contract does not support a claim with particularity. The signing of a Nunn agreement overrides an insurer's objections when there is a bad faith claim. Moreover, if State Farm is suggesting that Defendants committed fraud or collusion, such allegations should appears in the Complaint.

Issues

Does State Farm's Complaint state a plausible claim for relief?

Principles of Law

C.R.C.P. 12

/ / /
(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:
/ / /
(5) failure to state a claim upon which relief can be granted….

Standard of Review

C.R.C.P. 12(b)(5) motions test the formal sufficiency of the complaint. *Barton v. Law Officers of John W. McKendree*, 126 P.3d 313, 314 (Colo. App. 2005). All averments of material fact in the complaint must be accepted as true and all allegations in the complaint must be viewed in the light most favorable to the plaintiff. *Walsenburg Sand & Gravel Co., Inc. v. City Council*, 160 P.3d 297 (Colo. App. 2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Analysis

As a preliminary matter, the court must determine whether the act of entering into a Nunn agreement can serve as a basis for a breach of contract. This type of agreement arises from the case *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010), in which the Supreme Court found that that a pretrial agreement involving a stipulated judgment and covenant not to execute between a plaintiff-passenger and the insured driver was sufficient to establish actual damages as an element of passenger's bad faith claim against the driver's insurance company. The court found that such agreements are a step that the insured may take to protect itself from liability when the insurer has acted unreasonably by refusing to defend its insured or refusing a settlement offer that would avoid possibility of excess

liability for the insured. *Id.* at 119-20. The Federal District Court further interpreted the *Nunn* decision as operating "to forgive the Plaintiff's agreement to settle the case with the clients" without the insurer's consent. *Larson v. One Beacon Ins. Co.*, 2013 WL 5366401 at *3 (D. Colo. 2013). In *Larson*, the insurer similarly argued that the plaintiff breached the insurance contract's "cooperation clause" by entering into a settlement without consent of the insurer. The Court noted that, while it was undisputed that the settlement was effected without One Beacon's consent, in the face of a "colorable bad faith claim," the insurer is precluded from invoking the cooperation clause. *Id.*

While the court and State Farm agree that a Nunn agreement is a recognized form of stipulation, the court does not read either *Nunn* or *Larson* as automatically allowing for such agreements. Indeed, both cases suggest that the insured may enter into such an agreement when the insurer "has acted unreasonably" or in the face of a "colorable bad faith claim." *See Nunn* and *Larson*, *supra.* State Farm's Complaint alleges that it retained counsel and provided a defense. Compl. at ¶4. De La Cruz-Arellano's Motion to Dismiss contains a number of allegations that State Farm acted in bad faith, without supporting affidavit or extraneous evidence. The determination of whether State Farm acted in bad faith or unreasonably—and thus whether the Nunn agreement was proper—requires resolution of evidentiary issues. However, "[i]n passing on a motion to dismiss a complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof." *Dillinger v. North Sterling Irr. Dist.*, 135 Colo. 100, 308 P.2d 608, 609 (1957). The court is thus unwilling to say, at this time, that the mere fact that a Nunn agreement was entered into absolves Defendants of potential liability for breach of contract.

As to State Farm's specific claim, in order to succeed on a breach of contract claim, State Farm must prove by a preponderance of the evidence that (1)

Defendants entered into a contract with State Farm; (2) that Defendants failed to fulfill their obligations under the contract; and (3) State Farm substantially performed its obligations under the contract or is excused from performance, if such performance is a condition precedent to State Farm's right to recover. Colo. Jury Instr., Civil 30:10. The Complaint alleges the following key facts:

(1) Hinojosa and Gracia-Guerrero entered into an insurance contract in which State Farm provided liability coverage. Compl. at ¶2;
(2) Cruz-Arellano filed suit against Hinojosa and Gracia-Guerrero, alleging injuries from a motor vehicle accident. *Id.* at ¶¶1, 3;
(3) State Farm provided a defense to Hinojosa and Gracia-Guerrero. *Id.* at ¶4;
(4) Hinojosa and Gracia-Guerrero subsequently entered into a Nunn agreement with Cruz-Arellano. *Id.* at 7;
(5) The agreement restricts State Farm's ability to defend against the lawsuit. *Id.* at ¶8;
(6) The insurance policy contains provisions requiring the insured to cooperate with State Farm. *Id.* at ¶¶9, 11, 13;
(7) The Nunn agreement violates Hinojosa and Gracia-Guerrero's obligations to State Farm. *Id.* at ¶¶10, 12, 14;
(8) The Nunn agreement interferes with State Farm's right to litigate the case. *Id.* at ¶¶9-10.

The court thus finds that these alleged facts are sufficient at this time to state a plausible claim for relief. Regardless of whether State Farm will be required to prove the third element, the court finds that Paragraph 4 satisfies this element for the purposes of reviewing on the Motion to Dismiss. De La Cruz-Arellano's Motion raises a number of important factual questions. However, at this point, the court need not resolve such questions, nor must they be answered in State Farm's Complaint.

Order

De La Cruz-Arellano's Motion to Dismiss is **DENIED.**

Dated this 3rd day of April, 2017.

By the Court:

F. Michael Goodbee
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that the foregoing document was sent via JPOD (e-file) to all counsel of record and to all *pro se* parties this 3rd day of April, 2017.