

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM FIRE & CASUALTY CO. :
A/S/O DIANNE JECKOVICH :
 : CIVIL ACTION
v. :
 : NO. 19-3288
PECO ENERGY COMPANY :

MEMORANDUM

SURRICK, J.

FEBRUARY 13, 2020

Presently before the Court is Defendant's Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint (ECF No. 7). For the following reasons, Plaintiff's Motion will be denied.

I. BACKGROUND

Defendant is an electric utility company. (Compl. ¶ 5, ECF No. 1.) On October 26, 2018, certain vegetation in close proximity to one of Defendant's electric service cables fell onto the cable and caused an electrical surge. The surge, in turn, caused a fire that damaged property owned by Dianne Jeckovich ("Jeckovich"). (*Id.* ¶¶ 2, 8.) At the time, Plaintiff provided homeowners insurance to Jeckovich. (*Id.* ¶ 2.) As a result of the damage, Jeckovich filed an insurance claim with Plaintiff. Plaintiff paid the claim and assumed Jeckovich's right to sue Defendant in connection with the October 26, 2018 incident. (*Id.* ¶¶ 3, 9.)

Plaintiff filed suit against Defendant on July 26, 2019, asserting four counts: (1) negligence; (2) breach of contract; (3) breach of warranties; and (4) strict liability. (*Id.* at 3-7.) In support of its claims, Plaintiff alleges that Defendant failed to comply with its common law and contractual duties to manage the vegetation surrounding its electric service cables. (*Id.* ¶¶ 11-13.) On August 14, 2019, Defendant filed this Motion to Dismiss. (ECF No. 7.) On

August 28, 2019, Plaintiff filed a response in opposition. (ECF No. 8.) On August 30, 2019, Defendant filed a Reply. (ECF No. 9.)

II. DISCUSSION

A. Standard of Review

Defendant moves to dismiss Counts II, III, and IV of the Complaint for failure to state a claim under Rule 12(b)(6). On a 12(b)(6) motion, “courts ‘accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.’” *Eid v. Thompson*, 740 F.3d 118, 122 (3d Cir. 2014) (quoting *Phillips v. Cnty. Of Allegheny*, 515 F.3d 223, 233 (3d Cir. 2008)). “In order to defeat a Rule 12(b)(6) motion, plaintiffs’ ‘[f]actual allegations must be enough to raise a right to relief above the speculative level....’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Thus, ‘only a complaint that states a plausible claim for relief survives a motion to dismiss’” under Rule 12(b)(6). *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

B. Plaintiff’s Claims Are Plausible

“[T]he standard of care imposed upon a supplier of electric power, particularly when that power is supplied at high voltage, is among the highest recognized in the law of negligence... One maintaining a high voltage electric wire line is required to exercise the highest degree of care practicable.” *Greely v. West Penn Power Co.*, 156 A.3d 276, 281 (Pa. Super. Ct. 2017) (quoting *Schriner v. Pennsylvania Power & Light Co.*, 501 A.2d 1128, 1131 (Pa. Super. Ct. 1985)); *see also Estate of Zimmerman v. SEPTA*, 168 F.3d 680, 687 (3d Cir. 1999) (recognizing that under Pennsylvania law, “the supplier of electricity or the possessor of land site owes a heightened, rather than an ordinary, degree of care to an entrant on land with high-voltage

electrical transmission lines”). That duty of care includes “install[ing] (such) lines in a safe and proper manner and thenceforth to maintain them in a safe condition upon ‘reasonable inspection from time to time.’” *Stark v. Lehigh Foundries, Inc.*, 130 A.2d 123, 130 (Pa. 1957) (quoting *Durinzi v. West Penn Power Co.*, 55 A.2d 316, 317-18 (Pa. 1947)).

Moreover, Pennsylvania courts recognize that an electric company has a duty to maintain the vegetation surrounding its electric service cables. For example, in *Yoffee v. Pennsylvania Power & Light Co.*, 123 A.2d 636, 642, 647 (Pa. 1956), the court held that it was for the jury to determine whether a power company’s failure to remove vegetation near an electric tower was the proximate cause of an accident in which a plane flew into an inconspicuous transmission line. In *Kitner v. Claverack Rural Elec. Co-op., Inc.*, 478 A.2d 858, 860 (Pa. Super. Ct. 1984), the court held similarly that a jury could conclude that the power company failed to take the “feasible precaution” of trimming a tree that fell onto a power line, in turn causing the electrocution of several cows. *See also USAA Cas. Ins. Co. v. Metropolitan Edison Co.*, No. 12-1178, 2014 WL 3534946, at *14 (M.D. Pa. July 16, 2014) (denying motion for summary judgment on claim that electric company failed to perform necessary vegetation management).

Defendant’s only argument in support of its Motion is that the Electric Service Tariff (“Tariff”) governing its relationship with Jeckovich operates as a limitation of liability precluding Counts II, III, and IV of the Complaint.¹ The Tariff language on which Defendant relies provides in relevant part:

¹ “A tariff is a set of operating rules imposed by the State that a public utility must follow if it wishes to provide services to customers.” *USAA Cas. Ins. Co. v. Metropolitan Edison Co.*, No. 12-1178, 2012 WL 6838951, at *4 (M.D. Pa. Dec. 17, 2012) (citing *PPL Elec. Utils. Corp. v. Pennsylvania Pub. Util. Comm’n*, 912 A.2d 386, 402 (Pa. Commw. Ct. 2006)), *report and recommendation adopted by* No. 12-1178, 2013 WL 132510 (M.D. Pa. Jan. 10, 2013). “Public utility tariffs have the force and effect of law, and are binding on the customer as well as the utility.” *Id.* (citing *PPL Elec. Utils. Corp.*, 912 A.2d at 402). “The terms of a tariff essentially

12. SERVICE CONTINUITY

12.1 LIMITATION ON LIABILITY FOR SERVICE INTERRUPTIONS AND VARIATIONS. The Company does not guarantee continuous, regular and uninterrupted *supply of service*. The Company may, without liability, interrupt or limit the *supply of service* for the purpose of making repairs, changes, or improvements in any part of its system for the general good of the service or the safety of the public or for the purpose of preventing or limiting any actual or threatened instability or disturbance of the system. The Company is also not liable for any damages due to *accident*, strike, storm, riot, fire, flood, legal process, state or municipal interference, or any other cause *beyond the Company's control*.

...

The Company makes no warranty as to merchantability or fitness for a particular purpose, express or implied, by operation of law or otherwise. To the extent applicable under the Uniform Commercial Code or on any theory of contract or products liability, the Company *limits its liability in accordance with the previous paragraph* to any Customer or third party for claims involving and including, but not limited to, *strict products liability, breach of contract, and breach of actual or implied warranties of merchantability or fitness for an intended purpose*.

(Tariff ¶ 12.1, ECF No. 7-2) (emphasis added).²

A cursory review of the Tariff language reveals that the language cited by Defendant may not apply here. For example, one could interpret the limitation of liability imposed by this

replace private contracts.” *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 877 (Iowa 2007).

² The Complaint does not attach or refer to the Tariff. Defendant asserts that we may nevertheless consider the Tariff on a 12(b)(6) motion because it is a public record. *See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) (“To resolve a 12(b)(6) motion, a court may properly look at public records.”). Pursuant to statute, every public utility, such as Defendant, is required to file its tariffs with the Pennsylvania Public Utility Commission. *See* 66 Pa. Cons. Stat. Ann. § 1302. Based on its website, Defendant appears to have complied with this requirement. *See* <https://www.peco.com/MyAccount/MyBillUsage/Pages/CurrentElectric.aspx>. In addition, Plaintiff does not object to the Court’s consideration of the Tariff. Accordingly, we will consider it. *See also Imperial Irrigation Dist. v. California Independent Sys. Operator Corp.*, 146 F. Supp. 3d 1217, 1230 n.7 (S.D. Cal. 2015) (taking judicial notice of public utility tariff on motion to dismiss since terms of tariff could be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned” (quoting Fed. R. Evid. 201(b)).

provision to apply only to “service continuity” issues and “accident[s] ... beyond the Company’s control.” *Accord State Farm Fire & Cas. Co. v. PECO Energy Co.*, No. 19-2884, 2020 WL 424763, at *4 (E.D. Pa. Jan. 27, 2020) (agreeing with Pennsylvania Superior Court’s determination that “accident” clause in Tariff § 12.1 does not preclude recovery for “foreseeable” events (quoting *State Farm Fire & Cas. Co. v. PECO*, 54 A.3d 921, 929 (Pa. Super. Ct. 2012))). However, Plaintiff is not complaining about a service interruption or damages arising from circumstances beyond Defendant’s control. Plaintiff is alleging that Defendant’s failure to maintain the vegetation near its power lines (an issue that the Complaint suggests is in Defendant’s control) led to property damage (not a service interruption).

Regardless, “[i]t is not clear that the ... provisions critical here are so unambiguous that the interpretation of the [Tariff] exclusively is a matter for the Court and not for a jury.... Hence it would be improper for this court to interpret the [Tariff] finally in ruling upon a motion to dismiss made pursuant to Rule 12(b)(6).” *See Operative Bricklayer’s Union No. 64 of Pennsylvania Welfare Fund v. Bricklayer’s Local Union No. 1 of Pennsylvania Welfare Fund*, 45 F.R.D. 429, 431 (E.D. Pa. 1968); *accord Jade Grp., Inc. v. Cottman Transmission Ctrs., LLC*, No. 16-1237, 2016 WL 3763024, at *7 (E.D. Pa. July 13, 2016) (collecting cases); *cf. Lomma v. Ohio Nat’l Life Ass. Corp.*, 283 F. Supp. 3d 240, 260 (M.D. Pa. 2017) (holding that “even if the Defendants’ [contract] interpretation may be the more reasonable one, this does not permit the Court to resolve this issue in Defendants’ favor on their motion to dismiss”); *Masciantonio v. SWEPI LP*, No. 13-797, 2014 WL 4441214, at *6 n.5 (M.D. Pa. Sept. 9, 2014) (“If a writing is not ambiguous, it is appropriate for a district court to resolve the issue of contract interpretation as a matter of law, but typically on summary judgment rather than a motion to dismiss.”). This is not to say that we are concluding as a matter of law that the limitation of liability in § 12.1 is

inapplicable. We are not. We are concluding only that because we are unable to decide Defendant's argument on a motion to dismiss, Plaintiff's claims for breach of contract, breach of warranties, and strict liability may proceed. *See Eid*, 740 F.3d at 122. Our determination here is without prejudice to the parties' rights to make whatever arguments they deem appropriate in the later stages of this litigation.

Finally, we note that Plaintiff asserts additional arguments regarding the Tariff, including that the limitation of liability in § 12.1 is void as a matter of public policy and does not otherwise apply to willful and wanton conduct. Since we have determined that Plaintiff's claims are plausible, we decline to address these additional issues at this time. *See L.A. v. Hoffman*, 144 F. Supp. 3d 649, 672 n.13 (D.N.J. 2015) (declining to address additional basis for plaintiff's claim when court had already determined that plaintiff stated a plausible claim); *cf. Wharf, Inc. v. Dist. of Columbia*, 232 F. Supp. 3d 9, 22 (D.D.C. 2017) (holding that "the Court need not address what remedies are appropriate [on a 12(b)(6) motion] given that it has only determined that the parties have pled sufficient claims and counterclaims to survive a motion to dismiss").

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint will be denied.

An appropriate order follows.

BY THE COURT:



R. BARCLAY SURRICK, J.

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ORDER

AND NOW, this 13th day of February, 2020, upon consideration of Defendant's Motion to Dismiss Counts II, III and IV of Plaintiff's Complaint (ECF No. 7), Plaintiff response (ECF No. 8), and Defendant's reply (ECF No. 9), it is **ORDERED**, consistent with the accompanying Memorandum, that the Motion is **DENIED**.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.