

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

JOY PALAGRUTO : CIVIL ACTION
 :
 v. :
 :
 DIRECTOR, FEDERAL EMERGENCY :
 MANAGEMENT AGENCY - NATIONAL :
 FLOOD INSURANCE PROGRAM : NO. 98-0837

MEMORANDUM AND ORDER

HUTTON, J.

February 24, 1999

Presently before the Court are the Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment by the Director of the Federal Emergency Management Agency ("FEMA" or "Defendant") (Docket No. 5), the Response thereto by Joy Palagruto ("Palagruto" or "Plaintiff") (Docket No. 6) and Defendant's Reply thereto (Docket No. 7). For the foregoing reasons, the Defendant's Motion is **GRANTED**.

I. BACKGROUND

This is an insurance coverage case in which the Director of the Federal Emergency Management Agency ("FEMA" or "Defendant"), now files a motion for judgement on the pleadings or, in the alternative, for summary judgment. Joy Palagruto ("Palagruto" or "Plaintiff") brings this action against FEMA under the National Flood Insurance Act, 42 U.S.C. §§ 4001-4129 ("NFIA") to recover under her FEMA-written Standard Flood Insurance Policy ("SFIP").

On September 8, 1996, Plaintiff's home located at 2513 Brookdale Avenue, Roslyn, Pennsylvania, was damaged in a flood. At the time of the flood, Plaintiff's home was insured with a flood insurance policy from FEMA--the SFIP. Plaintiff's home was insured for \$88,000, with a \$5,000 deductible. Plaintiff's insurance policy required her to submit a sworn statement with the amount she claimed under the policy within sixty days after the loss. Following the loss, Plaintiff hired Hillis Adjustment Agency ("Hillis") as her representative to handle her claim with Defendant. Hillis was unable to inspect the home and measure the exact dollar amount of the damages to Plaintiff's home.

On September 11, 1996, Hillis forwarded a signed Proof of Loss to Defendant. In the space that asked for the "Amount Claimed under the above numbered policy," Plaintiff entered "To Be Determined." On September 23, 1996, FEMA sent Plaintiff a letter stating that it reviewed the form and rejected it because no amount was stated on the form. In that letter, FEMA advised her that the form was inadequate and did not comply with the proof of loss requirements. FEMA informed Plaintiff that she was required to submit a sworn statement with the amount she claimed under the policy within sixty days after the loss.

Plaintiff hired an independent adjuster, Charter Adjustment Company ("Charter"), which conducted an inspection of Plaintiff's home on September 18, 1996. On October 20, 1996, the

adjuster informed the Plaintiff that he estimated the damages to Plaintiff's home to be \$4,867.83.

The period to file a proof of loss expired on November 8, 1996. However, on January 16, 1997, FEMA gave Plaintiff "ten (10) days from the date of this letter" to file her proof of loss. On January 27, 1997, Hillis submitted a "Preliminary Estimate" to FEMA in the amount of \$15,396.47. On February 7, 1997, FEMA notified Plaintiff that her previous submissions, the Proof of Loss and Preliminary Estimates, were inadequate for lack of documentation and failure to submit a valid proof of loss.

About this time, Plaintiff learned that Abington Township's contractor estimated the damage to Plaintiff's home at \$28,635.00. On February 10, 1997, Hillis and Charter then conducted another inspection of Plaintiff's home. The parties could not agree as to the amount of damages. On February 19, 1997, FEMA notified Plaintiff that her claim had been rejected because her proof of loss was inadequate and the loss was less than her deductible.

On February 18, 1998, Plaintiff filed her Complaint with this Court. On September 30, 1998, FEMA filed its Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. Plaintiff filed her response to Defendant's motion on October 14, 1998. On October 23, 1998, the Defendant filed a reply memorandum in support of its motion.

II. STANDARD OF REVIEW

FEMA has moved for "judgment on the pleadings" or, in the alternative, for summary judgment. The Defendant's dispositive challenges, however, relate to whether this court has subject matter jurisdiction over this action. Lack of subject matter jurisdiction should be raised and adjudicated by a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, not under 12(c) or a motion for summary judgment. Solomon v. Solomon, 516 F.2d 1018, 1027 (3d Cir. 1975) (citing Fed. R. Civ. P. 12(h)(13)). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court determines whether it has authority or competence to hear and decide the case, whereas a motion for summary judgment goes to the merits of the action, See 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 543, 547.

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D.Pa. 1995), aff'd, 91 F.3d 125 (3d Cir.) (table), cert. denied, 117 S. Ct. 435 (1996); Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D.Pa. 1993). Consequently, judgment under Rule 12(c) will only be granted where the moving party has clearly established that no material issue of fact

remains to be resolved and that the movant is entitled to judgment as a matter of law. Regalbuto, 937 F. Supp. at 377 (citing Inst. for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991)). Additionally, the district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Regalbuto, 937 F. Supp. at 377 (citing Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)).

Conversely, in deciding whether there is subject matter jurisdiction, affidavits and other matters outside the pleadings may be considered. See Mortenson v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 549-50. As the Third Circuit stated in Mortenson, the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Mortenson, 549 F.2d at 891; see Dunlap v. Sears, Roebuck & Co., 478 F. Supp. 610, 611 n. 1 (E.D. Pa. 1979) (citing Mortenson). Unlike the practices under Rule 12(b)(6), the fact that matters outside the pleadings are considered does not transform a Rule 12(b)(1) motion to dismiss

into a motion for summary judgment. See Lefkowitz v. Lider, 443 F. Supp. 352, 254 (D. Ma. 1978); Progressive Steelworkers Union v. Int'l Harvester Corp., 70 F.R.D. 691, 692 (N.D. Il. 1976) (citing 2A J. Moore's Federal Practice P 12.09).

III. DISCUSSION

A. Plaintiff's Claims

In its Motion, Defendant raises essentially two issues. Defendant argues that this Court is without subject matter jurisdiction and Plaintiff failed to state a claim because she failed to file an adequate proof of loss. Plaintiff does not deny that her proof of loss failed to comply with the rules set forth in her insurance policy. She argues, however, that this Court should preclude FEMA from raising the defense of a Plaintiff's failure "to file a timely and/or proper Proof of Loss." To support this contention, Plaintiff relies exclusively on Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982). This Court finds Plaintiff's reliance on Meister Brothers misguided, and this Court lacks subject matter jurisdiction over her claim.

1. NFIA

Congress found that "many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions" and, therefore, authorized the creation of the

National Flood Insurance Program ("NFIP") "with large-scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry." Id. § 4001(b); see generally Sodowski v. NFIP, 834 F.2d 653 (7th Cir.1987), cert. denied, 486 U.S. 1043 (1988). Thus, the NFIP is a Federally-subsidized program that makes affordable flood insurance available to the public at or below actuarial rates. [H.Rep. No. 786, 90th Congress, 2nd Sess. (1967); S.Rep. No. 11233, 90th Congress, 1st Sess. (1967)]; see Burch v. Federal Ins. Admin., 23 F.3d 849 (4th Cir. 1994). Although the NFIP is generally available to the public, Congress granted FEMA authority to define and limit the nature and scope of coverage provided under the SFIP.

2. Analysis

It is undisputed that FEMA issued the flood insurance policy to the Plaintiff pursuant to the NFIP. Plaintiff does not refute that her policy provides that in order to sue to recover money under the policy she must file a sworn proof of loss with the insurance company within sixty days of the loss. Furthermore, it is uncontroverted that plaintiff has never filed a sworn proof of

loss.\¹ In addition, NFIP did not give Plaintiff a written waiver of this requirement.

Numerous courts have held that an insured's failure to comply with the proof of loss requirement of a federal insurance policy bars a subsequent action for recovery under that policy. See, e.g., Cross Queen, Inc. v. Director, FEMA, 516 F. Supp. 806 (D.V.I. 1980); Harper v. National Flood Insurers Ass'n, 516 F. Supp. 725 (M.D.Pa. 1981); Continental Imports, Inc. v. Macy, 510 F. Supp. 64 (E.D. Pa. 1981); Margate City Yacht Club v. FEMA, No. 82-2291 (D.N.J., Jul. 15, 1983) (Cohen, J.), aff'd, 732 F.2d 146 (3d Cir. 1984); Nymmco of New Jersey v. Giofrida, No. 82-2861 (D.N.J.), aff'd, 740 F.2d 958 (3d Cir. 1984). This is true even where the claim is denied prior to the expiration of the 60 day period provided for filing the proof of loss. See, e.g., Continental Imports, supra.

Plaintiff's reliance on Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982) is misguided. First, the opinion has not been followed in this circuit. Second, the Court in Meister Brothers cautioned that: "We emphasize that our holding is of necessity limited to the unique circumstances of this case." Id.

¹Plaintiff first submitted to the Defendant a "Proof of Loss," which was defective for failure to include the amount the Plaintiff was claiming under the Policy as required by the SFIP. Plaintiff then submitted to the Defendant a "Preliminary Estimate," which was not accompanied by supporting documentation or pictures to verify the loss and its estimate of damages. Furthermore, Plaintiff did not submit a signed and sworn proof of loss with the Preliminary Estimate.

at 1176. In Meister Brothers, the claimant entered into a series of prolonged negotiations with the FEMA adjuster over the value of his claim. The claimant failed to execute a proof of loss until three months after the deadline for filing but, upon receipt of the proof of loss, FEMA paid a portion of the claim. Negotiations continued unsuccessfully on the value of the unpaid portion of the claim, and after the claimant filed suit, FEMA invoked the 60-day proof of loss requirement as a defense to any further liability. In finding that the government was estopped, the court relied chiefly on the fact that FEMA had already paid a portion of the claim prior to invoking the proof of loss requirement. The court noted that FEMA had the necessary information provided in a proof of loss and concluded that "the actions of paying part of the claim under a policy which the insurer has treated as being fully applicable to the entire claim, over many months of time, does not permit a withdrawal thereafter from the position clearly and unambiguously taken." Meister Bros., 674 F.2d at 1177. In Meister Brothers, the court emphasized that its decision was limited to the unique facts of the case and was not intended to provide an appropriate standard for resolution of future cases. Id.

The Court concludes that Meister Brothers is inapplicable to the present case.² Unlike the situation in Meister Brothers,

²The First Circuit has concluded that Meister Brothers is inconsistent with the Supreme Court's decision in Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984). Phelps v. Fed.

(continued...)

FEMA has not paid any portion of Palagruto's claim. Moreover, on three separate occasions, FEMA informed the Plaintiff that her Proof of Loss was insufficient, and even gave her an extension of time to cure her defect. Despite FEMA's notices, Plaintiff failed to submit an adequate proof of loss. FEMA stated in its letter of February 19, 1997, that the reason the file was closed was because of Palagruto's failure to provide a proof of loss. In addition, despite Plaintiff's contention that FEMA has received the necessary information for processing her claim, she has failed to provide FEMA with the information which would have been provided by a sworn proof of loss. If the necessary information from the proof of loss had actually been provided as it was in Meister Brothers, this dispute may have been averted. Thus, unlike Meister Brothers, in the present case FEMA did not pay any portion of the claim and it did not receive the information which would have been provided in a proof of loss. Accordingly, Plaintiff's Complaint must be dismissed.

An appropriate Order follows.

²(...continued)

Emergency Management Agency, 785 F.2d 13, 17 (1st Cir. 1986); see also Wagner v. Director, FEMA, 847 F.2d 515, 518-20 (9th Cir. 1988). However, because Meister Brothers is inapplicable to the present case, there is no need to address the continuing validity of Meister Brothers.

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O R D E R

AND NOW, this 24th day of February, 1999, upon consideration of the Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment by the Director of the Federal Emergency Management Agency ("FEMA" or "Defendant") (Docket No. 5), the Response thereto by Joy Palagruto ("Palagruto" or "Plaintiff") (Docket No. 6) and Defendant's Reply thereto (Docket No. 7), IT IS HEREBY ORDERED THAT the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that Clerk of Court **SHALL** mark this Case closed.

BY THE COURT:

HERBERT J. HUTTON, J.