IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 2011-CV-00050 REB-CBS

JORGINA HERRERA,

Plaintiff,

v.

ALLIANT SPECIALTY INSURANCE SERVICES, INC. and
HUDSON INSURANCE COMPANY,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT

Defendants Alliant Specialty Insurance Services, Inc. and Hudson Insurance Company (collectively "Tribal First")[1], through their attorneys, Gordon & Rees LLP, file this Motion to Dismiss the Amended Complaint (Dkt. # 22) pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff's added claims for equitable estoppel and fraud fail to state a claim and, as set forth in Tribal First's initial Motion to Dismiss (Dkt. # 3), this Court lacks subject matter jurisdiction as the insurance policy only provides benefits subject to tribal law.

I. D.C.COLO.LCivR 7.1(A)

The undersigned have not conferred with Plaintiff's counsel regarding this Motion to Dismiss as the relief requested herein is pursuant to Fed. R. Civ. P. 12. D.C.COLO.L.Civ.R. 7.1(a). The basis for this Motion to Dismiss cannot be resolved by amending the Complaint. *See* REB Civ. Practice Standard V.H.2.

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[1] Alliant and Hudson are affiliated companies. "Tribal First" is a registered trademark of Alliant.

II. INTRODUCTION

This lawsuit involves a dispute regarding Tribal First's alleged bad faith adjustment of Plaintiff Jorgina Herrera's worker's compensation claim. Plaintiff alleges that she was an employee of the Southern Ute Indian Tribe and sustained injuries arising out of and in the course of her employment. Tribal First issued a workers' compensation insurance policy to the Tribe that applies tribal law and pays any benefits pursuant to tribal ordinance, not state or federal law.

Despite the foregoing, Plaintiff attempted to sue Tribal First in Colorado state court for state-based claims for breach of contract, breach of the implied duty of good faith and fair dealing, and vicarious liability. These claims are based upon alleged violations of the "Colorado Workers' Compensation Act", "nationally established insurance standards for the adjustment of workers' compensation claims" and Colorado Revised Statutes regarding unfair methods of competition and unfair or deceptive acts or practices. After removing this lawsuit to this Court based on diversity jurisdiction, Tribal First filed a Motion to Dismiss based upon lack of subject matter jurisdiction and failure to state a claim. Jurisdiction is only proper before the tribal court and only tribal law applies pursuant to the governing insurance policy.

In apparently acknowledging the deficiencies in her Complaint, Plaintiff recently filed an Amended Complaint. However, the Amended Complaint is substantially similar to the original Complaint and merely adds insubstantial factual allegations, as well as claims for equitable estoppel and fraud. It remains that the Amended Complaint has the same deficiencies as raised in the Motion to Dismiss. Rather than re-articulate those issues, Tribal First incorporates its Motion to Dismiss and Reply in Support of Motion to

Dismiss herein pursuant to Fed. R. Civ. P. 10(c). In addition, even if this Court somehow had jurisdiction, it should dismiss the equitable estoppel claim as this claim is not cognizable and Plaintiff improperly attempts to assert this claim on behalf of the Tribe. The fraud claim should also be dismissed since Plaintiff attempts to assert the rights of unidentified Native American Tribes not before this Court and, therefore, lacks standing. Further, Plaintiff has not, and cannot, comply with the particularity requirement for pleading fraud. Plaintiff failed to plead the time, place, and contents of Tribal First's alleged misstatements. Instead, Plaintiff has only made general allegations that Tribal First defrauded unidentified, non-party Native American Tribes.

III. PROCEDURAL BACKGROUND

On December 6, 2010, Plaintiff filed her Complaint and Jury Demand in the District Court, La Plata County, State of Colorado. (Compl. [Ex. A to Dkt. # 1].) Tribal First removed this lawsuit to the U.S. District Court for the District of Colorado based on diversity jurisdiction. (Notice of Removal [Dkt. # 1].) Tribal First filed a Motion to Dismiss [Dkt. # 3] as Plaintiff's state law claims are based solely on an insurance policy that provides workers' compensation benefits pursuant to only tribal law. (*Id.*) Since this Court does not have jurisdiction over tribal law claims, it lacks subject matter jurisdiction. (*Id.*) Moreover, the state law claims fail to state a claim for relief given that tribal law applies. (*Id*.) Plaintiff filed an Objection and Response to the Motion to Dismiss and Tribal First filed a Reply in Support of Motion to Dismiss. (Response to Motion to Dismiss [Dkt. # 12]; Reply in Support of Motion to Dismiss [Dkt. # 13].)

On March 4, 2011, after the Motion to Dismiss was fully briefed, Plaintiff filed her Motion for Leave to Amend Complaint and Caption and Amended Complaint. (Motion

for Leave to Amend [Dkt. # 15].) Plaintiff sought "to make the Complaint compliant with F.R.C.P [sic] 8 and 9, and to address some of the matters raised in Defendants' Motion to Dismiss for lack of subject matter jurisdiction." (*Id.* ¶ 3.)[2] This Court referred the Motion for Leave to Magistrate Judge Shaffer, who granted it subject to Tribal First's right to file a Fed. R. Civ. P. 12(b) Motion in response to the Amended Complaint. (Minute Order granting Motion for Leave to Amend [Dkt. # 21].) The Amended Complaint is substantially similar to the Complaint and includes additional claims for equitable estoppel and fraud. (*Compare* Am. Compl. [Dkt. # 22] *with* Compl. [Dkt. # 3].) Tribal First now files this Motion to Dismiss in response to the Amended Complaint.

IV. STATEMENT OF FACTS

For purposes of this Motion to Dismiss, the following facts are undisputed.

Plaintiff was employed by the Southern Ute Tribe (the "Tribe"). (Am. Compl. ¶ 6.) Plaintiff alleges that while employed by the Tribe she "sustained injuries arising out of and within the course of her employment . . . ." (*Id.*) Plaintiff alleges that, although an employee of the Tribe, she did not reside on tribal land, was not a tribal member and is not Native American. (Am. Compl. ¶ 9.) Tribal First issued an insurance policy[3] to the Tribe which provides workers' compensation benefits for injured employees of the Tribe. (Am. Compl. ¶¶ 7; 13.)

Plaintiff alleges that the "[t]he policy of insurance was issued in the State of Colorado, but not on the Southern Ute tribal reservation." (Am. Compl. ¶ 7.) Plaintiff

[2] On March 11, 2011, Plaintiff filed her Second Reply to Defendant's Motion to Dismiss. (Second Reply [Dkt. # 18].) The Second Reply is procedurally defective since it was filed without seeking, or obtaining, leave from the Court authorizing a sur-reply. Tribal First did not object to the Second Reply since it became moot when Magistrate Judge Shaffer entered an Order granting leave to amend the Complaint on March 23, 2011.

[3] An authentic copy of the Policy is attached to the Motion to Dismiss as Exhibit A.

further alleges that "Defendants Alliant and Hudson issued a policy of insurance to the Southern Ute Tribe that promises to pay workers' compensation benefits to the Tribe's injured workers, including Plaintiff Jorgina Herrera, comparably to benefits due and payable under the Colorado Workers' Compensation Act." (Am. Compl. ¶ 13.) The Policy actually provides:

> Sovereign Nation Workers' Compensation means the workers or workmen's compensation benefits as established by you [the Tribe]. It does not include any state, federal worker or workmen's compensation law, any federal occupational disease law or the provisions of any law that provide non-occupational disability benefits.
>
> Recognizing the tribe as a sovereign nation, with its corresponding civil jurisdiction, the actual benefits provided by this policy are subject to the tribal ordinance related to workers compensation benefits, in effect as of the effective date of this policy.
>
> In the absence of a tribal ordinance you may or may not elect to utilize a state's workers' compensation benefit levels as a guideline for the benefits payable under this policy. However, in no event shall benefits payable exceed such state level benefits. The mere use of a state's benefit levels as a guide for payments, however, does not constitute an adoption of such state's benefit levels and shall not be construed as a waiver of your sovereign immunity.

(Policy, General Section § C.)

The Amended Complaint includes allegations substantially similar to those in the Complaint that Tribal First violated the covenant of good faith and fair dealing. (*Compare* Am. Compl. ¶ 15 *with* Compl. ¶ 13.) However, Plaintiff additionally alleges that Tribal First violated unidentified "nationally established insurance standards for the adjustment of workers' compensation claims" in addition to her original allegation that Tribal First violated "the Colorado Worker's Compensation Act." (*Id.*) The Amended Complaint includes two additional allegations in support of Plaintiff's claims:

> Defendants Hudson and Alliant have failed and/or refused to establish a schedule or standard for the calculation of temporary, permanent, or disfigurement benefits for injured workers, and, consequently, have engaged in the arbitrary and capricious administration of workers' compensation claims asserted by the injured workers of Native American tribes, including the claim asserted herein by Plaintiff Herrera.
>
> Defendants Hudson and Alliant have routinely and maliciously denied benefits to injured workers of Native American tribes by falsely asserting to the injured workers that Defendant held the same sovereign immunity as the tribes and using this tactic to misinform and dissuade tribal employees from pursuing their rights under the contract in question.

(Am. Compl. ¶ 15.)

Besides the original claims for breach of contract, breach of the implied duty of good faith and fair dealing, and vicarious liability, the Amended Complaint adds claims for equitable estoppel and fraud. (Am. Compl. p. 7-8.) Plaintiff seeks to equitably estop Tribal First from asserting the defense of "tribal immunity":

> Plaintiff will show that the Southern Ute Tribe paid substantial consideration to Defendants Hudson and Alliant to create the obligation for said defendants to assume the duty to pay injured workers of the Southern Ute Tribe for injuries arising out of an [sic] in the course of their employment with the Southern Ute Tribe.
>
> Plaintiff Herrera and the Southern Ute Tribe detrimentally relied on Defendants' promises to pay injured workers for their industrial injuries.

(Am. Compl. ¶¶ 27-28.) Plaintiff also claims that Tribal First defrauded unidentified Native American Tribes into purchasing worker's compensation policies:

> Defendants Hudson and Alliant have, on a national level, deliberately engaged in a scheme to defraud Native American Tribes into purchasing policies of insurance to cover injured workers and member [sic] of tribes for the consequences of industrial injuries.
>
> Defendants Hudson and Alliant never intended to pay said injured workers pursuant to the policies of insurance underwritten by Defendants. Instead, Defendants intended to refuse payment to injured workers by attempting to shield themselves with the sovereign immunity of the tribes and use the doctrine of sovereign immunity to deny benefits to injured workers.

(Am. Compl. ¶¶ 31-32.)

V. LEGAL ANALYSIS

A. PLAINTIFF'S EQUITABLE ESTOPPEL CLAIM SHOULD BE DISMISSED BECAUSE IT IS NOT A COGNIZABLE CAUSE OF ACTION.

The U.S. District Court for the District of Colorado has long recognized that equitable estoppel is not an independent cause of action stating "[e]quitable estoppel prevents a party from asserting a right it otherwise would have available, while promissory estoppel creates an affirmative cause of action." *Gilford v. United States*, 573 F. Supp. 96, 98 (D. Colo. 1983). This Court continued "equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute. Promissory estoppel is a sword, and equitable estoppel is a shield." *Gilford*, 573 F. Supp. at 98 (*citing Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981)). Similarly, the Colorado Supreme Court recently announced that "whatever its theoretical relation to tort law, equitable estoppel is not a cause of action." *Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 742 (Colo. 2007). Instead, the Colorado Supreme Court described equitable estoppel "as an equitable doctrine that suggests a tort-related theory in that it attempts to allocate loss resulting from the misrepresentation of facts to the most culpable party and to ameliorate an innocent party's losses." *Id.* Thereafter, the Colorado Supreme Court stated "[w]e noted recently in *Wheat Ridge Urban Renewal Auth.*[], that equitable estoppel is not actually a cause of action as *DeLozier* and *Berg* appear to suggest." *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1004 n. 5 (Colo. 2008) (*citing Wheat Ridge Urban Renewal Authority* 176 P.3d at 741). More

recently, the Colorado Court of Appeals affirmed dismissal of a plaintiff's estoppel and waiver claims concluding they were affirmative defenses pursuant to C.R.C.P. 8(c), not independent causes of action. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741, 748 (Colo. Ct. App. 2009) (*citing Wheat Ridge Urban Renewal Auth.*, 176 P.3d at 741) ("equitable estoppel is not a cause of action, but rather a defensive doctrine").

In this case, Plaintiff improperly attempted to plead equitable estoppel as an independent cause of action. However, both this Court and the Colorado Supreme Court have held that equitable estoppel is not a cause of action. *Gilford*, 573 F. Supp. at 98; *Wheat Ridge Urban Renewal Auth.*, 176 P.3d at 741. Since equitable estoppel is not recognized as a cause of action, Plaintiff cannot maintain this claim, irrespective of the allegations pled.

Furthermore, even if Colorado somehow recognized equitable estoppel as a claim, Plaintiff lacks standing to pursue it. "In order to have sufficient standing to sue, a plaintiff must have suffered an 'injury in fact' - namely, an actual or imminent, concrete and particularized invasion of a legally-protected interest." *Johnstown Feed & Seed, Inc. v. Cont'l W. Ins. Co.*, 641 F. Supp. 2d 1167, 1172 (D. Colo. 2009) (*citing ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1317-18 (10th Cir. 2008)). Plaintiff's equitable estoppel claim seeks to assert rights belonging, if at all, to the Tribe. (Am. Compl. ¶¶ 27-28). The Amended Complaint alleges, "Plaintiff will show that the Southern Ute Tribe paid substantial consideration to Defendants . . . Plaintiff Herrera and the Southern Ute Tribe detrimentally relied on Defendants' promises to pay injured workers for their industrial injuries." (*Id.*) Plaintiff lacks standing to assert the Tribe's

purported claims, to the extent any exist, because even if the Tribe was injured as alleged by Plaintiff, this injury does not translate into an actual, particularized injury to her legal rights. *Johnstown Feed & Seed, Inc*, 641 F. Supp. 2d at 1172. Plaintiff seeks to assert only the rights of the Tribe. (Am. Compl. ¶¶ 27-28.) Standing, however, prevents Plaintiff's attempts to enforce the rights of others to remedy injuries that are not actual, particularized injuries suffered by her. *Johnstown Feed & Seed, Inc.*, 641 F. Supp. 2d at 1172.

Based on the foregoing, Plaintiff's equitable estoppel claim should be dismissed as a matter of law.

B. PLAINTIFF DOES NOT HAVE STANDING TO MAINTAIN A FRAUD CLAIM AND FAILED TO PLEAD IT WITH THE PARTICULARITY REQUIRED BY FED. R. CIV. P. 9(b).

Fed. R. Civ. P. 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The U.S. Court of Appeals for the Tenth Circuit requires that "a complaint alleging fraud [] 'set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (*citing Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)); *LaRiviere, Grubman & Payne, LLP v. Phillips*, 2010 U.S. Dist. LEXIS 45657 (D. Colo. 2010) (*citing Koch*, 203 F.3d at 1236). One purpose of Rule 9(b)'s particularity requirement "is 'to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based. . . .'" *Id.* (*citing Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th

Cir. 1992)). "Rule 9(b) also safeguards defendant's reputation and goodwill from improvident charges of wrongdoing . . . and it serves to inhibit the institution of strike suits." *Farlow*, 956 F.2d at 987 (*citing Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. N.Y. 1990)).

"The elements of common law fraud under Colorado law are: [1] that the defendant made a false representation of a material fact; [2] that the party making the representation knew it was false; [3] that the party to whom the representation was made did not know of the falsity; [4] that the representation was made with the intent that it be acted upon; and [5] that the representation resulted in damages." *Wood v. Houghton Mifflin Harcourt Publ. Co.*, 569 F. Supp. 2d 1135, 1140 (D. Colo. 2008) (*citing Brody v. Bock*, 897 P.2d 769, 775-76 (Colo. 1995)); *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994) (*citing Zimmerman v. Loose*, 162 Colo. 80, 425 P.2d 803 (1967); *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937).

In this case, Plaintiff's fraud claim consists of two conclusory paragraphs alleging that Tribal First "deliberately engaged in a scheme to defraud Native American Tribes into purchasing policies of insurance to cover injured workers" but "never intended to pay said injured workers pursuant to the policies of insurance . . . ." (Am. Compl. ¶¶ 31-32.) Plaintiff further alleges that "[i]nstead, Defendants intended to refuse payment to injured workers by attempting to shield themselves with the sovereign immunity of the tribes". (Am. Compl. ¶ 32.)

Plaintiffs allegations completely fail to satisfy the heightened fraud pleading standards of Fed. R. Civ. P. 9(b). Plaintiff did not plead the "time, place and contents of the false representation, the identity of the party making the false statements [or] the

consequences thereof" as required by the U.S. Court of Appeals for the Tenth Circuit. *Koch*, 203 F.3d at 1236. Instead, Plaintiff relies on ambiguous, vague and conclusory allegations to support her fraud claim. In fact, Plaintiff does not allege that Tribal First made any representations to her regarding the Policy. Importantly, Plaintiff concedes that she "moves for leave to amend her complaint to make the Complaint compliant with F.R.C.P. [sic] 8 and 9 . . . ." (Motion to Amend ¶ 3.) Thus, Plaintiff was aware of the particularity requirement in Rule 9(b), yet she still failed to plead the "time, place and contents of the false representation [and] the identity of the party making the false statements". *Koch*, 203 F.3d at 1236.

Plaintiff also lacks standing to pursue this claim. Plaintiff attempts to assert claims that belong, if at all, to unidentified "Native American Tribes" based on statements Tribal First allegedly made to those tribes to induce them to purchase workers' compensation insurance policies. (Am. Compl. ¶ 31.) As set forth *supra*, "in order to have sufficient standing to sue, a plaintiff must have suffered an 'injury in fact' - namely, an actual or imminent, concrete and particularized invasion of a legally-protected interest." *Johnstown Feed & Seed, Inc.*, 641 F. Supp. 2d at 1172 (*citing ACLU of New Mexico*, 546 F.3d at 1317-18). Any injury that unidentified Native American Tribes may have sustained from the alleged misrepresentations made by Tribal First, are not injuries to Plaintiff. In fact, Plaintiff admits that she "does not reside on the Southern Ute Reservation. She is not a member of the Southern Ute Tribe. She is not Native American." (Am. Compl. ¶ 9.) Only the unidentified tribes that were allegedly mislead into purchasing the workers' compensation polices could be potentially harmed by Tribal First's unidentified misstatements. However, Plaintiff

clearly is not a member of any tribe that purchased an insurance policy from Tribal First. (*Id.*) She lacks standing to assert injuries allegedly sustained by unidentified Native American Tribes.

Based on the foregoing, this Court should dismiss Plaintiff's fraud claim.

C. THIS COURT LACKS SUBJECT MATTER JURISDICTION AND THE STATE-BASED CAUSES OF ACTION FAIL TO STATE A CLAIM FOR RELIEF.

Tribal First incorporates herein by reference its initial Motion to Dismiss and Reply in Support of Motion to Dismiss. Fed. R. Civ. P. 10(c); *Lowden v. William M. Mercer*, 903 F. Supp. 212, 216 (D. Mass. 1995) (approving incorporation by reference of legal arguments advanced in motion to dismiss in defendant's motion to dismiss amended complaint). It remains that this Court lacks subject matter jurisdiction over Plaintiff's state law claims. The Amended Complaint, which merely adds two additional state-based claims, has not corrected this deficiency. Plaintiff's claims, including the new equitable estoppel and fraud claims, are still based on conduct arising from the terms of the Policy. However, the Policy only obligated Tribal First to provide benefits pursuant to tribal ordinance, not Colorado state of federal law. (Policy General Section, § C.) Plaintiff concedes that she has not, and cannot, address Tribal First's position that only the tribal court has jurisdiction to hear her state-based claims. (Motion for Leave to Amend Complaint, ¶ 3) (The Amended Complaint "address[es] some of the matters raised in Defendants' Motion to Dismiss for lack of subject matter jurisdiction.") Since Plaintiff cannot amend the Complaint to correct this deficiency, this Court should dismiss the Amended Complaint.

VI. CONCLUSION

For the foregoing reasons, Tribal First respectfully requests that this Court grant its Motion to Dismiss the Amended Complaint.[4]

Dated: April 6, 2011

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[4] Should this Court grant this Motion, Tribal First reserves its rights to seek attorneys fees and costs.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was electronically filed with the Clerk of the United States District Court using the CM/ECF system which will send notification to all counsel referenced below, this the 6th day of April, 2011 addressed to:

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