



ORIGINAL

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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT - 1 2025

SELDEN JONES
CLERK

BENTSON PROPERTIES, LLC,)
)
Plaintiff/Appellant,)
)
vs.)
)
CHICAGO TITLE INSURANCE)
COMPANY, CHICAGO TITLE)
OKLAHOMA CO., FIDELITY NATIONAL)
FINANCIAL, INC. d/b/a Fidelity)
National Law Group, PATRICK JOOST,)
GERALD SAGER;)
PKK HOLDINGS, LLC,)
PAMELA KLOIBER,)
and MICHAEL KLOIBER,)
)
Defendants/Appellees.)

Case No. 122,232

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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ANTHONY L. BONNER, DISTRICT JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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EDWARD L. WHITE, PC
Edmond, Oklahoma

For Plaintiff/Appellant

Melvin R. McVay, Jr.
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For Defendants/Appellees

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Bentson Properties, LLC, appeals the court's grant of the defendants' motions to dismiss. Upon review, we find that the court properly dismissed Bentson Properties' claims against Fidelity National Financial Inc., d/b/a Fidelity National Law Group, Patrick Joost, and Gerald Sager (collectively, the Fidelity defendants) for breach of insurance contract and bad faith, but should have allowed Bentson leave to amend its petition to address deficiencies regarding its other claims against the Fidelity defendants, Chicago Title Insurance Company (CTIC), and Chicago Title Oklahoma Company (CTOC) (collectively, Chicago Title).¹

BACKGROUND

In 2020, Bentson Properties purchased a piece of commercial real estate from PKK Holdings LLC and related title insurance from Chicago Title. Adjoining owners—the Tettletons, who are not parties to this suit—filed suit against Bentson Properties later that year contending that they were the owners, via adverse possession, of a portion of Bentson's newly-acquired property. Bentson requested Chicago Title defend it against the Tettleton lawsuit pursuant to the title insurance. According to the petition, Chicago Title did not immediately investigate or vigorously defend that suit. Chicago Title eventually retained the

¹ It appears that Bentson Properties brought this suit against both CTIC and CTOC because it was unclear which entity actually issued the policy. The policy itself states that it was issued by "Chicago Title Insurance Company." ROA 40, *Exhibit 2*, pg. 2. However, the policy was countersigned by Charles Francis, an officer of Chicago Title Oklahoma Co. *Id.* at 3. Further, the policy lists the name and address of the insurance company as that of Chicago Title Oklahoma. *Id.* at 5.

Fidelity defendants to undertake the defense of the Tettletons' adverse possession claim.

Bentson Properties was not content with the legal representation the Fidelity defendants provided, and on February 11, 2021, it filed suit against CTIC only in Oklahoma County Case No. CJ-2021-644, claiming that CTIC had breached its duty to defend under the policy by providing inadequate or conflicted representation. The suit was dismissed with prejudice on June 8, 2021, apparently after a settlement was reached. However, the Fidelity defendants continued to represent Bentson Properties until 2023, when Bentson demanded the Fidelity defendants withdraw as counsel because it believed that the Fidelity defendants and Chicago Title were colluding in bad faith during the representation, that the Fidelity defendants were acting in the interests of Chicago Title rather than Bentson Properties, and that this had caused unwarranted difficulty resolving the Tettleton suit. Based on that alleged conduct, Bentson Properties brought the current suit against the Fidelity defendants and Chicago Title for breach of the title policy, bad faith handling of the title policy claim, and legal malpractice and breach of loyalty against the Fidelity defendants only.²

² Bentson Properties also named PKK Holdings, LLC, Pamela Kloiber, and Michael Kloiber in this suit. The Kloibers, through PKK, apparently owned the property that Bentson Properties had purchased. However, the claims against Pamela and Michael individually were dismissed. Additionally, PKK filed an answer in this case on December 29, 2023, and the claims against it remain pending. The trial court, however, expressly directed that the order be filed as a final order pursuant to 12 O.S. § 994(A), allowing this appeal to proceed.

The Fidelity defendants, CTOC, and CTIC filed separate motions to dismiss asserting various grounds for dismissal. At the hearing, at which the court orally indicated it would grant all three motions, Bentson Properties sought the opportunity to amend, but the trial court determined that such would be futile. Prior to the filing of a written order, Bentson Properties filed a motion to reconsider again seeking amendment but was again denied. The court entered an order granting all three motions and finding that any amendment of Bentson Properties' petition would prove futile. Bentson Properties appeals.³

STANDARD OF REVIEW

Motions to dismiss are generally viewed with disfavor, and the burden of demonstrating a petition's insufficiency—placed on the party moving for dismissal—is not a light one. *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841. When reviewing a motion to dismiss, this Court exercises *de novo* review. *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155. When reviewing a motion to dismiss, this Court examines only the controlling law, not the facts, and, thus, this Court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. *Id.*

³ It appears this appeal should have proceeded under the accelerated procedure of Supreme Court Rule 1.36, which does not allow for briefing unless requested and provides for separate procedures for compiling the record. Nevertheless, the case was not so docketed, and, on January 23, 2025, the Supreme Court directed Bentson Properties to file an appellate brief. We have reviewed the briefs but find they do not contain any information or argument materially additive to that which was before the trial court.

“[T]he trial court has always possessed discretion over whether to allow an amendment to a pleading” subject to 12 O.S. § 2015(A)’s requirement “that leave to amend be given freely if justice requires.” *Prough v. Edinger, Inc.*, 1993 OK 130, ¶ 8, 862 P.2d 71, 73. Whether to allow an amendment of the pleadings is left to the discretion of the trial court. *Id.* A trial court’s decision to deny a motion to amend will not be overturned, however, absent a showing of abuse of the court’s discretion under the circumstances. *Id.*

ANALYSIS

On appeal, Bentson Properties primarily raises the issue of whether the court erred in dismissing its claims with prejudice rather than granting leave to amend pursuant to 12 O.S. § 2012(G).⁴ Bentson brought claims against both the Fidelity defendants and Chicago Title for breach of the title policy, bad faith handling of their policy claim, and legal malpractice and breach of loyalty claims against the Fidelity defendants only.

The Fidelity defendants argue that Bentson Properties conceded that their claims against Fidelity based in the insurance contract should be dismissed. Tr. (Jan. 4, 2024), 5. However, Bentson Properties did not entirely concede this, but stated as follows regarding the breach of contract and bad faith claims:

There is merit to the idea that counsel cannot be held liable for “bad faith” or for breach of the insurance contract, and Plaintiff did not

⁴ Counsel for Bentson Properties effectively conceded at the hearing that its petition, as it stood, was insufficient, making that question rather simple for the trial court, and this Court. He stated: “[E]ssentially our pleading isn’t up to par. It’s sub par right now. There’s (sic) elements we need to address. There’s (sic) points we need to clarify.” Tr. (1/4/2024), 13. The remainder of the argument focused on the request to amend. We find that the trial court did not error in granting the motions, especially in light of these concessions. As the primary arguments below focused on the ability to amend, so shall we.

intend to assert such claims against Chicago Title In-House Counsel. However, its actions may be attributable to Chicago Title to the extent that the counsel's actions would, if undertaken by Chicago Title directly, comprise bad faith or a breach. To the extent that the factfinder concludes that Chicago Title In-house Counsel was acting not in Plaintiff's best interests, but rather in the interest and at the desire of Chicago Title, such actions by counsel may comprise bad faith or breach of contract via agent or one with apparent authority. The issue is convoluted, and it should be resolved at a later date when evidence relevant to the complexity has been gathered.

ROA 330, *Plaintiff's Response to Certain Defendants' Motions to Dismiss*. Bentson Properties clearly attempted to maintain a contractual claim against the Fidelity defendants on an agency theory. For the following reasons, however, we agree with the Fidelity defendants that Bentson Properties cannot maintain an action for breach of contract or insurance bad faith against them, even as an agent.

It is clear that the Fidelity defendants were not parties to the insurance contract between Chicago Title and Bentson Properties. Thus, the Fidelity defendants had no contractual duty to assess, handle, and pay claims in good faith. Bentson Properties attempts, however, to raise an agency theory that the Fidelity defendants can be held liable for breach of the insurance contract and insurance bad faith as agents of Chicago Title. However, we find it well-settled that an agent is not liable for a breach of contract entered into between a third party and a disclosed principal. *See Shebester v. Triple Crown Insurers*, 1992 OK 20, ¶ 16, 826 P.2d 603, 609, (holding that one who deals as an agent on behalf of a disclosed principal is not liable for the latter's *ex contractu* breach) Further, only the insurer typically owes the duty of good faith and fair dealing to its insured. "Agents of the insurer—even agents whose acts may have been material

to a breach of the duty—do not normally owe the insured a duty of good faith since agents are not parties to the insurance contract.” *Wathor v. Mut. Assur. Adm’rs, Inc.*, 2004 OK 2, ¶ 8, 87 P.3d 559, 562. Thus, Oklahoma caselaw is clear that the Fidelity defendants cannot be held liable for breach of insurance contract or bad faith, even via an agency theory.⁵ Therefore, we find that the court properly dismissed these two claims.

Bentson Properties’ remaining claims are legal malpractice and “breach of loyalty” against the Fidelity defendants and breach of contract and bad faith against Chicago Title. The petition does not appear to have pled these claims with enough specificity to avoid dismissal. By example, the amended petition generally references “conflicts of interest” without ever stating what such conflicts are, emphasizes the issues and conduct that led to the 2021 suit as opposed to identifying conduct after the settlement that would entitle it to relief, and states that the defendants were somehow dilatory in finalizing a settlement agreement even though the delay was evidently because Bentson Properties refused to agree to the final settlement. Further, it appears Bentson Properties takes issue with Chicago Title’s attempt to settle the claims in the Tettleton Lawsuit at all and with its decision to not assert claims Bentson might have against PKK. Pursuant to the insurance contract, however, Chicago Title could pursue settlement and was not required to pursue claims just because its

⁵ Bentson Properties would essentially create a new insurance tort here, holding that, if an insurer resists a claim in bad faith, and hires counsel to assist it, counsel takes on the duties of the insurer, and may be sued for bad faith. We reject this novel theory.

insured thought it should. See ROA 47, *Amended Petition*, Exhibit 2, Section 7 “Options to Pay or Otherwise Settle Claims.”

Bentson Properties acknowledged that its most recent petition was insufficient to move forward in this case, see note 4, *supra*, but argued that it should have been granted leave to amend. At the hearing on the motion to dismiss, the court stated that it was of the impression that, unless there had been wrongful conduct post-settlement, the present claims *all* stemmed from the Tettleton litigation, which was settled just before the hearing on the motion to dismiss. Counsel for Bentson Properties then asked the court for leave to amend the petition so it could clarify the issues, but counsel could not identify any specific amendment he wished to make.⁶ The dispositive question to address on appeal is therefore whether the court erred by refusing to grant Bentson Properties leave to amend to fix the deficiencies in the amended petition because it did not articulate at the hearing what amendments it might make, but merely averred that amendment was possible.

Title 12 O.S. § 2012(G) provides: “On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed.” The

⁶ The court inquired: “What are you going to amend to say?” and “what I’m hearing from you is there’s different claims. And I’m asking what. So that they can have an opportunity to respond and I can make an assessment as to whether, yeah, you should have an opportunity to amend, or, no, that’s going to be futile.” Tr. (Jan. 4, 2024), 35. Counsel for Bentson Properties was unable to answer the court’s questions and again reiterated his request for amendment acknowledging that even if it was unable to articulate or clarify how the claims in the current petition were different than those made in 2021, it was nonetheless entitled to amend.

Supreme Court has interpreted the statute as a mandatory duty placed on trial courts, as long as the defect can be remedied. *See Kelly v. Abbott*, 1989 OK 124, ¶ 6, 781 P.2d 1188, 1190. A trial court's decision to deny amendment will not be overturned absent an abuse of that discretion. *Prough v. Edinger, Inc.*, 1993 OK 130, ¶ 8, 862 P.2d 71, 75. However, the trial court's discretion is limited by the provisions of 12 O.S. § 2015(A), requiring that leave to amend be given freely if justice requires. *Marshall v. Allstate Ins. Co.*, 1990 OK CIV APP 100, ¶ 9, 805 P.2d 689, 691. "In order for the courts to dismiss a claim for failure to state a cause of action without giving the plaintiff the opportunity to amend, it must appear that the claim *does not exist* rather than the claim has been defectively stated." *Fanning v. Brown*, 2004 OK 7, ¶ 23, 85 P.3d 841, 848 (emphasis added) (citing *Lockhart v. Loosen*, 1997 OK 103, ¶ 5, 943 P.2d 1074, 1078).

At the hearing on the motion to reconsider, counsel for Bentson Properties did affirmatively state that it should be allowed to amend to allege that Chicago Title engaged in further breaches of contract and insurance bad faith outside of the 2021 settlement.⁷ Further, counsel alleged that, although Chicago Title's allegedly wrongful conduct was similar to the conduct that led to the 2021 settlement, it occurred after settlement. *Id.* Counsel further maintained that the

⁷ Bentson Properties asks us on appeal to determine whether the 2021 settlement with Chicago Title can bar claims against non-parties to the settled action (Fidelity defendants) and whether a settlement of claims up to a specified date can release claims for wrongful conduct occurring after the settlement date. We note that the settlement agreement between Chicago Title and Bentson Properties from the prior case in 2021 is not a part of this record on appeal, nor does it appear to have been seen by the trial court. Thus, we cannot definitively determine what the agreement covered or did not cover. On remand, in order to determine what was settled by the settlement, it would be prudent for the trial court to review the written settlement agreement, presuming such a document exists.

Fidelity defendants committed malpractice by acting in Chicago Title's interest, as opposed to representing the interest of their client, Bentson Properties. *Id.* at 7. Counsel also asserted that it could allege but-for causation, a required element of malpractice, if given the opportunity to amend. *Id.* at 14.

We hold, on these facts, that Bentson Properties should have been allowed to amend its petition to allege facts sufficient to support its remaining claims against the Fidelity defendants for malpractice, and against Chicago Title for breach of contract and bad faith occurring after and not precluded by the 2021 settlement. We make no comment on whether Bentson Properties can plead facts that will support further litigation, but we find it was an abuse of the trial court's discretion to deny the request to amend as completely futile.

Accordingly, we affirm the dismissal of the claims against the Fidelity defendants based on contractual duties created by the insurance contract. We reverse the court's remaining dismissal of the malpractice claim against the Fidelity defendants and the dismissal of any contract and bad faith claims against Chicago Title that are not covered by the 2021 settlement. On remand, the plaintiff is required to file any amended petition within thirty days after mandate is filed in the district court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WISEMAN, P.J., and FISCHER, J., concur.

October 1, 2025