Circuit Court for Carroll County
Case No. 06-C-17-73495

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1444

September Term, 2017

KEVIN C. BETSKOFF

v.

STANDARD GUARANTY INSURANCE COMPANY

Nazarian,
Arthur,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: September 18, 2018

On May 9, 2017, appellant Kevin Betskoff filed a complaint against appellee Standard Guaranty Insurance Company in the Circuit Court for Carroll County. The complaint contained four counts and was based on events from the previous year, when appellant's residence was damaged by water and sewage. Appellant alleged that appellee, with whom he had a homeowner's insurance policy, improperly handled and denied his claim for coverage. Appellee responded by filing a motion to dismiss the complaint. After the circuit court granted appellee's motion to dismiss, appellant appealed.

Appellant presents four issues on appeal, which we have consolidated and rephrased as a single issue[1]:

Did the circuit court err in dismissing appellant's complaint?

Although we hold that the circuit court correctly dismissed the counts of appellant's complaint which alleged statutory claims that appellee failed to act in good faith, we hold that the court erred in dismissing the common law negligence count. Accordingly, we shall

[1] The issues, as presented by appellant, are as follows:

1. Did the [c]ircuit [c]ourt err substantively in granting [appellee's] Motion to Dismiss [appellant's] complaint and with no reason given?

2. Did [a]ppellant draft a complaint properly enough for relief to be granted?

3. Did [appellant] exercise administrative remedies set forth in the Insurance Article of the Maryland Code with the MIA?

4. Did the trial [c]ourt err in granting [appellee's] Motion to Dismiss without a hearing, where a hearing had been requested by [appellant]?

(continued)

vacate the circuit court's order as to its dismissal of the negligence count, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On or around March 19, 2016, raw sewage overflowed from the toilet and shower drain in appellant's bathroom. The sewage covered the bathroom floor, and spilled out into appellant's bedroom, living room, and office area. As a result, appellant incurred costs to repair the septic system and clean the affected areas of his home.

Appellant subsequently filed a homeowner's insurance claim with appellee. Appellee thereafter sent an inspector to interview appellant and take pictures of the affected area. According to appellant, the inspector did not follow up with appellant or return appellant's calls. Despite multiple attempts to contact appellee about the status of his claim, it was not until December 2016 that appellant received written notice from appellee denying insurance coverage for appellant's claim.

On May 9, 2017, appellant filed a complaint against appellee in the Circuit Court for Carroll County. Appellant's complaint contained four counts: 1) breach of duty, 2) bad faith dealing, 3) negligence, and 4) breach of the implied covenant of good faith and fair dealing. With the exception of the negligence count, each of the counts alleged either that

[2] Because appellant appeals the circuit court's granting of appellee's motion to dismiss, we are required to "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Higginbotham v. Pub. Serv. Comm'n of Md.*, 171 Md. App. 254, 264 (2006) (quoting *Britton v. Meier*, 148 Md. App. 419, 425 (2002)). Accordingly, our factual recitation presumes the truth of the facts alleged in appellant's complaint.

appellee had acted in bad faith, or that appellee had failed to act in good faith in handling appellant's insurance claim. Appellant requested compensatory damages, punitive damages, court costs and filing fees, and an award for lost income.

On June 16, 2017, appellee moved to dismiss the complaint. Appellee argued that because appellant's claims were premised on allegations that appellee had acted without good faith in denying coverage, appellant's complaint fell within Section 27-1001 of the Insurance Article and Section 3-1701 of the Courts and Judicial Proceedings Article. Appellee asserted that under these provisions, appellant was required to invoke and exhaust administrative remedies prior to filing a civil lawsuit. On July 18, 2017, appellant filed an opposition to appellee's motion to dismiss, asserting that he had exhausted his administrative remedies with the Maryland Insurance Administration ("MIA"), and claiming that the MIA advised him to file a lawsuit in circuit court.[3]

On September 15, 2017, without holding a hearing, the circuit court granted appellee's motion to dismiss.[4] Appellant noted a timely appeal.

[3] Appellant did not attach any agency records or communications to his opposition. In a footnote, appellant stated that, "These communications are not only written, some are saved recorded voicemails . . . . Since I represent myself, I want to treat said communications as work product for now and have not attached them to these pleadings."

[4] Three days after the circuit court entered its order, appellee filed a reply to appellant's opposition and attached records from the Maryland Insurance Administration related to appellant's administrative complaint. Because none of these records were before the circuit court when it made its decision, we will not consider them on appeal. *See Cochran v. Griffith Energy Serv., Inc.*, 191 Md. App. 625, 663 (2010) ("[A]n appellate court must confine its review to the evidence actually before the trial court when it reached its decision.").

STANDARD OF REVIEW

"The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Higginbotham v. Pub. Serv. Comm'n of Md.*, 171 Md. App. 254, 264 (2006) (quoting *Britton v. Meier*, 148 Md. App. 419, 425 (2002)). "We accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018) (quoting *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)). "Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven." *Higginbotham*, 171 Md. App. at 264 (quoting *Britton*, 148 Md. at 425).

DISCUSSION

As noted above, appellee moved to dismiss appellant's complaint on the basis that appellant was required to exhaust his statutory administrative remedies before filing a complaint in court. Before examining appellant's claims or the specific statutory provisions, however, it is helpful to review some of the overarching principles the Court of Appeals has identified when dealing with the relationship between administrative and judicial remedies.

Exclusive, Primary, and Concurrent Remedies

"Whenever the Legislature provides an administrative and judicial review remedy for a particular matter or matters, the relationship between that administrative remedy and a possible alternative judicial remedy will ordinarily fall into one of three categories." *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60 (1998).

> *First*, the administrative remedy may be exclusive, thus precluding any resort to an alternative remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.
>
> *Second*, the administrative remedy may be primary but not exclusive. In this situation, a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy.
>
> *Third*, the administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.

Id. at 60-61 (citations omitted).

Whether an administrative remedy is exclusive, primary, or concurrent is ordinarily a question of legislative intent. *Id.* at 61. If the legislature explicitly specifies that an administrative remedy is intended to be exclusive, primary, or concurrent, then a reviewing court need not examine other factors to discern the legislature's intent. On the other hand, "[i]n the absence of specific statutory language indicating the type of administrative remedy, there is a rebuttable presumption that an administrative remedy was intended to be primary. Thus, 'a claimant cannot maintain the alternative judicial action without first

invoking and exhausting the administrative remedy.'"[5] *United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 15 (2016) (citations omitted).

Appellant's Complaint

Appellant's complaint contained four counts: Count 1 (breach of duty) alleged that appellee "failed to exercise good faith and due care in protecting the interests of its insured"; Count 2 (bad faith dealing) alleged that appellee "acted in bad faith by failing to adequately consider the severity of [appellant's] claims"; Count 3 (negligence) alleged that appellee "had a duty to [appellant] to properly insure his home and provide [appellant] with a valid and legal homeowner's insurance policy protecting his property[,]" and that appellee violated its duty by denying coverage on appellant's claim; and Count 4 (breach of the implied covenant of good faith and fair dealing) alleged that appellee had failed to comply with the "implied covenant of good faith and fair dealing."

As noted above, appellee moved to dismiss appellant's complaint on the basis that it contained claims appellant could not pursue in court without first invoking and exhausting applicable administrative remedies provided in Md. Code (2007, 2013 Repl. Vol., 2017 Supp.), § 3-1701 of the Courts and Judicial Proceedings Article ("CJP"), and

[5] This presumption of a primary administrative remedy may be rebutted after consideration of the following four factors: "1) the comprehensiveness of the administrative remedy in addressing an aggrieved party's claim; 2) the administrative agency's view of its jurisdiction over the matter; 3) the claim's dependence upon the statutory scheme; and 4) the claim's dependence upon the administrative agency's expertise." *United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 17 (2016) (citing *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 64-66 (1998)).

Md. Code (2007, 2017 Repl. Vol.), § 27-1001 of the Insurance Article ("Ins."). We will examine these statutory provisions and their relationship to plaintiff's complaint.

Counts 1, 2, and 4

Based upon the administrative law principles articulated by the Court of Appeals as discussed above, we readily conclude that the circuit court properly dismissed Counts 1, 2, and 4 of appellant's complaint. CJP § 3-1701 and Ins. § 27-1001, enacted by the General Assembly in 2007, set forth administrative and judicial remedies a first-party insured may bring against a property and casualty insurer who fails to act in good faith in denying coverage or declining payment for a covered loss. *See Thompson v. State Farm Mut. Auto, Ins. Co.*, 196 Md. App. 235, 238 (2010). Notably, this cause of action did not previously exist under Maryland law. *See Johnson v. Fed. Kemper Ins. Co.*, 74 Md. App. 243, 248 (1988) ("[W]e hold that Maryland does not recognize a specific tort action against an insurer for bad faith failure to pay an insurance claim.").

With the passage of CJP § 3-1701, the General Assembly created a statutory cause of action for "first-party claims under property and casualty insurance policies or individual disability insurance policies issued, sold, or delivered in the State." CJP § 3-1701(b). To fall within the purview of CJP § 3-1701, the claim must: 1) seek either a determination of existing coverage, or the payment an insured is entitled to receive for a covered loss; 2) allege the insurer failed to act in good faith; *and* 3) seek expenses and litigation costs in addition to the actual damages under the policy. CJP § 3-1701(d). With several exceptions

not relevant here,[6] the claimant must first file an administrative complaint and obtain a final decision before he may file an action in court. CJP § 3-1701(c)(1); Ins. § 27-1001(c)(1). Ins. § 27-1001 mandates that the claimant's administrative complaint first be filed with the MIA, and sets forth the procedural requirements for obtaining judicial review of an adverse decision from the MIA. Ins. § 27-1001(d)-(g). The legislature's intent could not be more clear: "A complaint stating a cause of action under [CJP § 3-1701] shall first be filed with the Administration." Ins. § 27-1001(d)(1). In short, the statutory remedy is primary. *See Zappone*, 349 Md. at 61.

Here, Counts 1, 2 and 4 each: 1) sought payment for a covered loss under a property and casualty policy, 2) alleged appellee insurer's lack of good faith, and 3) requested expenses and litigation costs in addition to the actual damages under the policy. Because each of these counts satisfied the express statutory requirements of a CJP § 3-1701(d) claim, appellant was required to first exhaust his administrative remedies under Ins. § 27-1001 prior to filing these claims in court.[7] Accordingly, we affirm the circuit court's dismissal of Counts 1, 2, and 4 of appellant's complaint. *See Prince George's Cty. v. Ray's*

[6] There are three exceptions to the requirement that a CJP § 3-1701 action must first be filed with the MIA: 1) claims within the small claims jurisdiction of the District Court, 2) claims where both the insured and insurer agree to waive the requirement, and 3) claims under a commercial insurance policy where the applicable limit of liability exceeds $1,000,000. Md. Code (2007, 2017 Repl. Vol.), § 27-1001(c)(2) of the Insurance Article. None of these exceptions apply here.

[7] We summarily dispose of appellant's unsupported assertion that he exhausted his administrative remedies prior to filing his complaint with the circuit court. The record contains no indication that appellant complied with the administrative procedure set forth in Ins. § 27-1001.

Used Cars, 398 Md. 632, 643-44 (2007) (affirming dismissal of plaintiffs' complaint when they had failed to exhaust their primary or exclusive administrative remedies).

Count 3

Count 3, the negligence count in appellant's complaint, requires further analysis because, unlike Counts 1, 2 and 4, it contained no allegation that appellee "failed to act in good faith" as required by CJP § 3-1701(d)(2). Because Count 3 does not state a statutory cause of action governed by CJP § 3-1701, the exhaustion requirement set forth in CJP § 3-1701 and Ins. § 27-1001 is inapplicable. Fortunately, the Court of Appeals has provided ample guidance in determining the types of claims that are nevertheless subject to exhaustion.

When dealing with plaintiffs who file insurance-related lawsuits in court without first pursuing administrative remedies, the Court of Appeals has distinguished common law claims that are "entirely independent of the statutory scheme" set forth by the Insurance Article, *Zappone*, 349 Md. at 65, from claims that cannot exist "without an essential underpinning found in the Insurance Article." *Carter v. Huntington Title & Escrow, LLC*, 420 Md. 605, 630 (2011).

1. Independent Common Law Claims

In *Zappone*, the Court of Appeals considered whether the general remedial provisions of the Insurance Article or its Unfair Trade Practices subtitle[8] provided an

[8] This subtitle contains Ins. § 27-1001.

exclusive or primary remedy for fraud, negligent misrepresentation, and negligence claims. 349 Md. at 50. Noting that these were "recognized common law causes of action," the Court held that:

> Although there is a legal presumption that a statutory administrative and judicial review remedy is intended to be primary, that presumption is rebutted under the circumstances here. The plaintiffs' asserted causes of action in deceit and negligence are wholly independent of the Insurance [Article]'s Unfair Trade Practices subtitle. No interpretations or applications of the Insurance [Article] or of any regulations by the Insurance Commissioner are involved. Instead, under the plaintiff's [sic] allegations and theory of the case, their right to recover money damages is totally dependent upon the common law tort principles applicable to deceit and negligence actions.

Id. at 67. The Court concluded that the General Assembly did not intend to require claimants to invoke and exhaust their administrative remedies under the Insurance Article's Unfair Trade Practices subtitle before pursuing independent common law tort remedies such as negligence. *Id.* at 68. In other words, the *Zappone* Court concluded that the legislature intended that those administrative remedies be "fully concurrent" with "other remedies" that may be available under the law. *Id*.

Although *Zappone* dealt only with common law tort claims, in *Mardirossian v. Paul Revere Life Ins. Co.*, 376 Md. 640, 649 (2003), the Court confirmed that common law contract claims are also concurrent to the administrative remedies provided for in the Insurance Article's Unfair Trade Practices subtitle.

2. Claims Dependent on Statute

In *Carter*, the Court of Appeals identified the line of demarcation between claims that are subject to administrative exhaustion and those that are not. There, the plaintiff

(Carter) filed a putative class action lawsuit against a title insurance company, alleging that the title insurer was overcharging in violation of the Insurance Article. 420 Md. at 609-10. In addition to his claims that the insurer had violated provisions of the Insurance Article, which he characterized as a common law claim for "money had and received[,]" Carter included a negligent misrepresentation claim alleging that the title insurer knew that the rate charged was incorrect, but made "an affirmative misrepresentation" that it was the proper rate. *Id.* at 610-11.

Although the Court reiterated its holdings from *Zappone* and *Mardirossian* that claimants could pursue a "recognized independent tort remedy" or a "common law contract remedy" without first invoking and exhausting administrative remedies under the Unfair Trade Practices subtitle of the Insurance Article, the Court distinguished the facts in *Carter* from those in *Zappone* and *Mardirossian*. *Carter*, 420 Md. at 624-26. Unlike the claims in *Zappone* and *Mardirossian*—which "existed without an essential underpinning found in the Insurance Article[,]"—the Court held that Carter's complaint, in its purest form, alleged "a statutory violation" rather than "a fully independent common law claim." *Id.* at 630-31. The Court also extended the same reasoning to Carter's negligent misrepresentation claim on the grounds that that claim was likewise based on an alleged violation of the Insurance Article, and that the MIA would be better equipped to decide such statutory issues. *Id.* at 637 n.15.

From *Zappone* and *Carter*, we discern a line of demarcation for determining which claims are subject to administrative exhaustion. In short, plaintiffs need not pursue

administrative remedies prior to filing a lawsuit for common law claims that are "wholly independent" of the Insurance Article. *Zappone*, 349 Md. at 67-68. However, claims that would not exist "without an essential underpinning found in the Insurance Article" are not viewed as independent common law claims; those claimants must first exhaust their administrative remedies before filing in court. *See Carter*, 420 Md. at 630.

3. Count 3 Does Not Require Administrative Exhaustion

In Count 3 of appellant's complaint—which he characterized as "Negligence"—appellant asserted that appellee violated its "duty to [appellant] to properly insure his home and provide [appellant] with a valid and legal homeowner's insurance policy protecting his property." Viewed in a light most favorable to appellant, Count 3 alleged a common law negligence action that is "wholly independent of the Insurance [Article]." *Zappone*, 349 Md. at 67. Specifically, Count 3 alleged that appellee had a duty to properly insure appellant's home, that appellee breached that duty, and that appellant had been harmed as a result of the breach. *See Barclay v. Briscoe*, 427 Md. 270, 292 (2012) ("In order to prevail on a claim of negligence in Maryland, a plaintiff must prove the existence of: (a) a duty owed by the defendant to the plaintiff, (b) a breach of that duty, and (c) injury proximately resulting from that breach."). Unlike the plaintiff's claims in *Carter*, appellant's Count 3 is not premised on an alleged violation of any statutory provision, and exists "without an essential underpinning found in the Insurance Article." *Carter*, 420 Md. at 630. As such, we view Count 3 as a fully independent common law negligence claim, which is concurrent to the administrative remedies contained in the Insurance Article. *See Zappone*, 349 Md.

at 68. Accordingly, we hold that the circuit court erred in dismissing the negligence count of appellant's complaint.

Other Issues

Appellant also argues that the circuit court erred in granting appellee's motion to dismiss through a short order without holding a hearing, and without providing any reasons for its decision. However, appellant fails to cite to any supporting authority in his brief, and we decline to address either of these arguments,[9] because as we have repeatedly stated, it "is not our function to seek out the law in support of a party's appellate contentions." *Benway v. Md. Port Admin.*, 191 Md. App. 22, 32 (2010).

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THAT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEE.

[9] Even if we were inclined to consider appellant's arguments, they lack merit. Appellee did not request a hearing in its motion to dismiss, and appellant's opposition requested merely that the court "[s]chedule a hearing on these and related matters only if the [c]ourt is on the fence and deems it necessary to decide this matter." Appellant's conditional request for a hearing is insufficient under Md. Rule 2-311(f). Furthermore, as appellee correctly notes, this Court routinely reviews grants of motions to dismiss in which the circuit court did not provide any rationale for its decision. *See, e.g., Briscoe v. Mayor and City Council of Baltimore*, 100 Md. App. 124, 128 (1994) ("The court did not state its reasons for granting the motion to dismiss. Thus, we should affirm the judgment if our review of the record discloses that the court was legally correct.").